ROYAL COMMISSION

ON

PENSIONS AND RE-ESTABLISHMENT

REPORT ON FIRST PART OF INVESTIGATION

(Matters referred to in G.W.V.A. telegram)

February, 1923

OTTAWA
F. A. ACLAND
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1923

REPORT OF THE ROYAL COMMISSION

APPOINTED TO INVESTIGATE AND REPORT UPON THE WORKING OF THE PENSIONS AND RE-ESTABLISHMENT

ACT, 1853.

(Laid before Parliament by Command of His Excellency.)

INVESTIGATION

INTO THE WORKING OF THE PENSIONS AND RE-ESTABLISHMENT ACT, 1853.

REPORT OF THE ROYAL COMMISSION

PRINTED BY GEORGE A. BERRIMAN, GOVERNMENT PRINTER, WELLINGTON.

1856.

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TO HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL

MAY IT PLEASE YOUR EXCELLENCY:

We, the Commissioners, appointed by Royal Commission dated July 22nd, 1922, issued pursuant to Order in Council P.C., 1525 of the same date, to investigate, inquire into, and report upon:

> Firstly, the matters referred to in complaints made by certain officials of the Great War Veterans Association as contained in a telegram hereinafter quoted; and
>
> Secondly, certain questions relating to pensions, medical treatment and re-establishment needs of Canadian ex-service men and their dependents;

have the honour to present to Your Excellency in Council our Report in respect to the First Part of such Investigation, namely, the matters referred to in said complaints.

The subject matter of the reference concerning said First Part of such Investigation is as follows:—

> The matters to be so investigated are set out in complaints made by certain officials of the Great War Veterans Association as contained in a telegram reported in the press as follows:—
>
> > Following recent disclosures surrounding Parliamentary inquiry we openly charge Pensions Board with contemptible and cold-blooded conspiracy to deprive ex-service men of rights previously granted by Parliament. There has been deliberate concealment, secret regulations, pensions and insurance in direct violation intention of Parliament and deliberate attempt to disguise facts before present Parliamentary Committee. This is culmination unsympathetic policy of increasing severity during recent months. Chairman Committee has consented to reopen question impressed by generally expressed indignation. This plot challenges basic rights ex-service men nullifies in principle established privileges and frustrates further re-establishment effort required.

For convenience in dealing with the subject matter of the reference, this report has been divided into six parts as follows:—

Part One.—Introduction.

Part Two.—Complaints concerning Section 11 of the Pension Act.

Part Three.—Complaints concerning Section 25 (3) of the Pension Act.

Part Four.—Complaints concerning Returned Soldiers' Insurance Act.

Part Five.—Complaints concerning general attitude and Policy of administration.

Part Six.—Conclusion.

ROYAL COMMISSION

ON

PENSIONS AND RE-ESTABLISHMENT

REPORT

ON

FIRST PART OF INVESTIGATION

PART ONE

INTRODUCTION

The Commission constituted by Royal Commission as aforesaid is referred to hereafter in this Report as the 'Commission.' The Pensions Board mentioned in the telegram above quoted is the Board of Pension Commissioners for Canada and this body is hereafter referred to in this report as the 'Pensions Board.'

The Commission organized, and held public sittings in Ottawa on twenty-nine days during the months of July, August, September, October and November, 1922, at which about 3,800 typewritten pages of evidence were taken.

The Pensions Board was represented by Dr. Gordon Henderson as counsel, and, on the application of the G.W.V.A., the Commission appointed Mr. J. R. Bowler, of Winnipeg, as counsel to aid in the presentation of the case of the G.W.V.A. Mr. Henderson and Mr. Bowler appeared and acted as counsel for the Pension Board and the G.W.V.A. at all the hearings.

The telegram was signed by Mr. C. G. MacNeil as Secretary, Dominion Command, Great War Veterans Association.

The telegram forthwith came to the attention of the Special Parliamentary Committee on Pensions, Soldiers' Insurance and Re-establishment, of which Mr. H. M. Marler, M.P. was Chairman, then sitting at Ottawa. Mr. MacNeil appeared before this Committee on June 16th, 1922, and submitted in writing particulars of the matters referred to in the telegram.

Following the taking of evidence at this sitting of the Committee, a recommendation was made in the report of the Committee to Parliament dated June 17th, 1922, that a Commission be appointed to inquire into the matters referred to in the telegram, and this recommendation was adopted in Order in Council above referred to. The particulars, which were presented to the Parliamentary Committee of the matters referred to in the telegram, were again presented on behalf of the G.W.V.A. to the Commission, and the points taken in these particulars were as follows:—

1. That the regulations based on Section 25 (3) of the Pension Act have been so amended by the Board as to nullify the intention of this Section and thus cause the cancellation of many awards previously made, and the rejection of legitimate claims now under consideration.

2. That in 1920 and 1921 amendments to Section 11 have been made applicable to ex-service men of the C.E.F. contrary to the intention of Parliament in accepting these amendments and the assurances publicly given by the commissioners, thus withholding pension from a large class of dependents.

3. That regulations were secretly introduced under which the Board assumed power to reject applications for insurance policies under the Returned Soldiers' Insurance Act on medical grounds, despite the decision of Parliament that such insurance would be available to all qualified applicants without regard to condition of health at the time of application.

4. That the aforesaid regulations have been illegally concealed and that adverse decisions have been rendered thereupon without disclosing same to the individuals affected, thus causing great distress and dissatisfaction.

5. That the general procedure of the Board has been such as to place the burden of proof with regard to attributability entirely upon the claimant for pension and that as result many ex-service men and dependents have been denied a proper opportunity to establish their rights.

6. That pensions have been reduced following a review of the findings of local examiners by Headquarters office in a manner contrary to the procedure announced before the Select Committee of the House of Commons.

7. That undue severity has been exercised with respect to disability ratings which to some extent confirms the report that secret instructions have been issued to reduce pensions in every way possible.

As will be seen from the above telegram and particulars, a most serious charge was made against the Pensions Board, in their official capacity, in respect to the motives which influenced them in the performance of their duties.

The Commission can state at the outset that there is no evidence of any conspiracy, plot or ulterior motive in the administration by the Pensions Board and their advisors of the Pensions Act, and in so far as the charges contained in the telegram under investigation impute wrong or improper motives, the Commission finds that the evidence fails to substantiate these allegations.

As a matter of fact, it was admitted in the course of the argument on behalf of the G.W.V.A. that there was no evidence that the Pensions Board plotted or schemed to do the things complained of, but it was claimed that the facts shown to have existed at the time the telegram was sent justified Mr. MacNeil in reaching the conclusion which he did. The Commission publicly stated at the close of the hearing that questions of plot and conspiracy and dishonest intent could be eliminated from consideration.

It was urged that with the disposal of the allegations and imputations of wrongful intent there was nothing left with which the Commission should deal, but, as was intimated at the close of the hearing, the Commission could not agree that this was the only phase of the matter which was under investigation. The Commission's duty is to inquire, investigate, and report. There still remains the question as to whether, even in the absence of wrongful intent, ex-service men had in fact been deprived of rights along the lines indicated, and as to the policy and attitude adopted by the Pensions Board and the principles under which pensions and insurance have been administered by it, so far as these were questioned. The Commission therefore reports the facts which have been brought out on the investigation, together with its conclusions.

The Pensions Board since the Act of 1919 was passed and for a considerable period previous thereto, has consisted of three members, and it has been made clear during the investigation that the evidence has been directed, not against the members of the Pensions Board in their personal or private capacity, but purely in respect of the official acts of the Board as a public body.

The telegram under investigation, eliminating imputations of improper motive, can be considered under the following heads:—

1. *Legislation on Pension matters*, and particularly
(*a*) Section 11 of the Pension Act (respecting Pensions generally); and
(*b*) Section 25 (3) relating to pre-enlistment disability.

Involved with these matters is the part taken by the Pensions Board in drafting and promoting the legislation, its statements as to its meaning and effect, and its interpretation and application of the legislation when passed.

Under this heading respecting pension legislation the reference in the telegram respecting ex-service men being deprived of "rights previously granted by Parliament," as to "secret regulations *re* pensions in direct violation of the intention of Parliament" and the "nullifying in principle of established privileges," are amplified in paragraphs 1 and 2 of the particulars.

2. *Returned Soldiers' Insurance Act*, involving the administration of this Act by the Pensions Board, as agents of the Minister of Finance, and particularly the circumstances under which applications came to be refused on medical grounds, which is claimed to have been a distinct departure from the intention of the Act and understanding given when it was passed.

As to this heading the references in the telegram, respecting "secret regulations" *re* insurance "in direct violation of the intention of Parliament", and the "nullifying in principle of established privileges," are amplified under paragraphs 3 and 4 of the particulars.

3. *General Attitude and Policy of Administration* in the consideration of applications for pension.

As to this heading, the references in the telegram claiming that ex-service men have been deprived of rights, and that the matters complained of are "culmination unsympathetic policy of increasing severity during recent months," are amplified under points 5, 6 and 7 of the particulars.

The Commission proposes to deal with the three headings above enumerated in the order stated.

PENSION ORGANIZATION

It should be stated generally that up to March 31, 1922, there were approximately 65,000 persons who were in receipt of pensions in Canada, 45,000 of these were disabled ex-soldiers and 20,000 were dependents of deceased ex-soldiers. Pensions and administration involved an expenditure of nearly $35,000,000 for the fiscal year ending March 31, 1922. Many of these pensions are being drawn in respect of disabilities which in their nature remain constant, such as amputation cases, but there are many more which come up for review periodically by reason of the fact that the disability may increase or decrease as time goes on. The returns show that the advisors of the Pensions Board during the year ending March 31, 1922, considered approximately 40,000 cases of Canadian ex-service men or their dependents, thus averaging between 125 to 150 per day, and in addition they made recommendations to the Imperial Ministry of Pensions respecting approximately 25,000 Imperial Pensioners.

The Pensions Board was authorized by Order in Council of June 3, 1916. It consisted then, as now, of three members. The Pensions Board was first constituted by Statute when the Pensions Act was passed in 1919. It has sole and exclusive jurisdiction in awarding pensions, and its decisions are final.

None of the original members of the Pensions Board remains in office. The following table shows the personnel of the Board from its inception, with the tenure of office of each member (Record p. 543):—

11-9-16 to 14-5-18, J. K. L. Ross, R. H. Labatt, J. L. Todd.
14-5-18 to 9-12-18, J. K. L. Ross, J. L. Todd.
9-12-18 to 17-2-19 J. K, L. Ross, J. L. Todd, J. Thompson.
17-2-19 to 14-5-19, J. K. L. Ross, J. Thompson, E. Coristine.
14-5-19 to 2-8-19, J. Thompson, E. Coristine.
2-8-19 to 18-8-20, J. Thompson, E. Coristine, J. W. Margeson.
18-8-20 to 1-12-21, J. Thompson, J. W. Margeson, E. G. Davis.
2-12-21 to date, J. Thompson, E. G. Davis, J. McQuay.

Up to January 1, 1921, the Pensions Board organization consisted of the three Commissioners themselves and about ten Assistant Medical Advisors, with their clerical staff at Headquarters. In the field there were about a dozen District Officers, with a total staff of about 250, each office being in charge of a District Manager. The examinations were made at the District Offices by the Pensions Medical Examiners of the Pensions Board, and then dealt with by Assistant Medical Advisors at Headquarters. The Department of Soldiers' Civil Re-establishment also maintained hospitals and field staffs for the purpose of providing treatment.

On January 1, 1921, by Order in Council P.C. 2936, the district organization of the Pensions Board was absorbed by the district organization of the D.S.C.R. on the understanding, as expressed in the Order in Council, that

> The unit heads of the Department of Soldiers' Civil Re-establishment, consisting of the assistant director and unit medical director, would deal directly with the Board of Pension Commissioners in Ottawa on all matters affecting pension, and instructions would be issued to them by the proper officials of the Board of Pension Commissioners.

The District Pensions Offices were closed. The local Pension Medical Examners in the districts thus passed from the staff of the Pensions Board to the staff of the D.S.C.R. but the Pensions Board still had the right to issue instructions on pensions matters which, instead of being communicated to the Pensions Medical Examiners through the District Pensions Office, were issued to the D.S.C.R. Unit Medical Director and by him to the Pensions Medical Examiners.

On April 1, 1921, a further absorption took place when, by Order in Council P.C. 1187, the Head Office Staff of the Pensions Board was absorbed by and transferred to the D.S.C.R. with the condition that the Pensions Board

> should continue to exercise full power and authority in dealing with the granting and renewal of and adjudication upon pensions.

The important effect of this was to transfer the Headquarters Staff of Assistant Medical Advisors from the Pensions Board to the D.S.C.R. Subsequently, by Order in Council P.C. 2722 dated August 17, 1921, the Headquarters Assistant Medical Advisors were returned to the Pensions Board. The organization of the Pensions Board therefore, from August 17, 1921, has consisted of the three Commissioners, some ten Headquarters Assistant Medical Advisors, and the secretarial and clerical staff of the Commissioners.

The Assistant Medical Advisors of the Pensions Board at Headquarters had been under Dr. Belton, as Chief Medical Advisor, but shortly after the amalgamation it was considered that a Chief Medical Advisor was not necessary, and Dr. Belton was removed to Toronto as Pensions Medical Examiner. Later on in the same year (1921) Dr. Arnold, who was already Director of Medical Services of the D.S.C.R., was made Chief Medical Advisor to the Pensions Board with jurisdiction over the Assistant Medical Advisors of the Pensions Board at Headquarters, he at the same time continuing in charge of the Pensions Medical Examiners of the D.S.C.R. in the districts, by virtue of his position as Director of Medical Services of the D.S.C.R.

The procedure on application for pension (Record P. 290 et seq) can be generally described as follows:—

An applicant generally presents his claim through the most conveniently situated unit office of the D.S.C.R. The applicant appearing in the first instance at a D.S.C.R. office is referred to the Pensions Medical Examiner there. He states his claim and if the Pensions Medical Examiner feels he has made out a case, or a possible case, he obtains from Ottawa details of the applicant's medical and military records, examines him and sends to the Pensions Board a report. This report describes the condition of the man, states the Medical Examiners' opinion as to the percentage of total disability, the percentage of pensionable disability and the relation of this latter to service. It is signed by the Pensions Medical Examiner for the Unit Medical Director of the D.S.C.R. The latter does not generally influence the report in any way. At Ottawa the report comes to the mailing division of the D.S.C.R. where it is opened by a clerk who, seeing it is an "Application for Pension," sends it to the Pensions Board. Arriving at the Pensions' Office, a sub-allocation staff assigns it, according to its nature, to one or other of the ten Assistant Medical Advisors. If, for instance, it is a complaint it goes to A, if a nerve condition to B, if a wound to C, etc. A, B, or C may review the file and communicate with the Unit Medical Director, either for the purpose of obtaining further information, or to indicate headquarters' decision. This decision is made, in all but a very small percentage of cases, by the Assistant Medical Advisor himself, without reference to the Pensions Board. The assistant Medical Advisors write and sign letters in their own names "for Secretary Board of Pensions Commissioners."

If the applicant writes to the Unit Office of the D.S.C.R. instead of appearing in person, he is instructed to report to the Unit Medical Director at the nearest D.S.C.R. office or, if distance makes this difficult, to a designated physician living near the applicant's home. This physician examines the applicant, and if his report to the Unit D.S.C.R. Office warrants it, the documents are obtained from Ottawa and the man is brought in for examination by the Pensions Medical Examiner, and the report is forwarded and dealt with as above.

PART TWO

COMPLAINTS RE SECTION 11 OF THE PENSION ACT

Questions for Consideration

The claim made by the G.W.V.A. in particularizing the statements in the telegram, is:—

> That in 1920 and 1921 amendments to Section 11 have been made applicable to ex-service men of the C.E.F. contrary to the intention of Parliament in accepting these amendments and the assurances publicly given by the Commissioners, thus withholding pension from a large class of dependents.

The Pension Act of 1919 is the first legislation which was passed respecting pensions payable on account of the Great War. Previously to 1919 war pensions were being paid under the authority of Orders in Council. The 1919 Act was an attempt to co-ordinate these various Orders in Council and put them into the form of a statute adopting the general principles which were then being applied.

Section 11 is the central section of the 1919 Act. It contains the authority for paying pensions and specifies the cases which are pensionable.

The questions raised as to section 11 are: (1) What rights did Parliament intend to give discharged C.E.F. men and their dependents under section 11 of the 1919 Act, and the important inquiry here is whether there was to be any change in these rights after the declaration of peace. (2) Were these rights adversely affected by the 1920 and 1921 amendments, or by the Pensions Board interpretation of them, and if so to what extent, and as to what classes? (3) Was it represented by the Pensions Board that these rights would not be affected adversely by the 1920 and 1921 amendments?

General Principles as to Pensions and Disabilities

Before dealing with these questions it is well to have in mind the general principles on which Canadian pensions are granted, and also what is understood by disabilities.

THE TWO PRINCIPLES IN CANADIAN PENSIONS

There were two distinct principles on either of which pensions were granted under the 1919 Act:

(1) The so-called "Insurance Principle." On this basis, ex-members of the forces were pensioned not only for any disability "attributable to Military Service," but as well for any disability "incurred on" service. Canada insured her soldiers for all disabilities incurred by them during their service period, whether or not service in any way actually caused the disability. For example, under the Insurance Principle, a man was pensioned if he were disabled either as the result of enemy shrapnel or on account of getting a splinter in his finger while whittling for amusement, provided it happened while he was on service; and in case of disease, he was equally entitled to pension if disabled as the result of trench feet, or from any ordinary peace-time disease, contracted during his period of service, although service itself may have had nothing to do with it.

(2) The other principle was the "due to service principle," and on this basis pension was only payable where the disability was attributable to, that is, caused by or resulting from military service itself.

The complaint is that discharged C.E.F. men and their dependents were pensioned on the Insurance Principle and that the Pensions Board represented before the 1920 Parliamentary Committee that the 1920 amendments, which brought in the "due to service principle," would apply to the permanent force and others serving during peace time, but that notwithstanding this the "due to service principle" was applied to discharged C.E.F. men and their dependents.

The cases therefore which are alleged to have been adversely affected are only those in which pension is claimed for disability or death arising out of something incurred during service, but not caused by military service.

MEANING OF DISABILITIES

The Act of 1919 defined "disability" as meaning "a wound, injury or disease," but this hardly expressed the correct idea of the term as applied in pension practice in Canada. A wound, or injury or disease might be wholly healed or cured, and therefore cause no disablement. The condition, if any, which was pensionable was the loss of ability resulting from the wound, injury or disease. The Pensions Board never acted on the literal interpretation of the definition in the 1919 Act, but granted pensions not for the wound or disease itself but for the disablement which the wound or disease had caused. In 1920 the definition was changed to conform with this idea, and "disability" was defined to mean:

> The loss or lessening of the power to will and to do any normal, mental or physical act.

In order to be pensionable, therefore, a man had to have not simply a wound, injury or disease—but a condition of disablement.

Connecting disabilities with the service period.—The further question, always, was whether the disability was connected with the period of service, and the determination of this question has been, and is, one of the most difficult and vexing problems that has faced the Pensions Board.

Disabilities apparent at discharge.—If the disabling condition was apparent at the time of discharge, it was obvious that it must have developed during service (except in a case where the trouble was present on enlistment).

Disabilities not apparent at discharge.—If, however, a man were discharged A1 and later a disability manifested itself, it had to be determined whether it was a new ailment or whether it was really a development of a slight disabling condition which had existed at the time of discharge, but had not been noticed.

Disabilities appearing after discharge which could be shown to have been continuous.—If the latter were the case, then the "disability" was pensionable on the ground that, although the discharge documents showed him to be A1, the soldier really "suffered" or had the disability when he was discharged. It follows therefore that the acid test, in cases of disabilities which appeared after discharge, has always been "has the disability now showing itself been continuously present in some degree, even though slight, back to the time of discharge." If so, it was, for pension purposes and in fact, "incurred during" service.

Disability appearing after discharge which could not be shown to have been continuous (Missing Link Cases).—There is a class of discharged men which will be referred to frequently in connection with section 11, and who, it is claimed, were adversely affected by the amendments of 1920. This class is

illustrated by the man who becomes disabled during service, is apparently cured at the time of discharge, but in whom subsequently the trouble flares up. These would appear to be really cases where the disability in some slight degree at least was continuous, because the cause of the "flare up" was always present—but the Pensions Board says that, after the 1920 amendments, even although the present disability was caused by something which originated on service, unless it is shown that there was an actual disability at the time of discharge, there is a missing link in the chain of continuous disability, and pension is refused. It says it is not enough to show simply that something was present at discharge which caused the subsequent disability, unless that "something" was an actual disability itself.

Prohibitory disabilities.—There are also cases where the soldier could, at the moment of discharge, exert himself physically or mentally as much as he ever could, but where, although the exertion was quite possible, it was distinctly inadvisable on account of possible future injurious effects because of some latent trouble which originated during the period of service. This condition was recognized as a disability and was referred to in the evidence as a prohibitory disability.

Summary re Disability.—(*a*) A disability is not simply a wound, injury or disease in itself, but a disabling condition resulting therefrom.

(*b*) A disability is "incurred" or "suffered," or "occurs" whenever the lessening of the normal ability of the man actually first exists, in no matter how slight a degree, and subsequent developments may be the best evidence of the existence of an earlier undiscovered—but actual—disability.

(*c*) Therefore a disability now appearing or complained of for the first time may be shown to have been " incurred " or " suffered " or to have "occurred" long previously by showing that it is only the development of a disability which has been continuously present.

(*d*) According to the Pensions Board practice, the important question in the Insurance Principle cases, after the 1920 amendments, was whether there was a " disability " at the time of discharge.

(*e*) The missing link cases show that an injury on service and a flare-up of that injury after discharge is not enough—the applicant must show that a disability in the sense of a disabiling condition existed at discharge.

Consideration of Questions

Taking up the questions for consideration stated above:—

(1) *What rights did Parliament intend to give discharged C.E.F. men and their dependents under Section 11 of the 1919 Act, and was there to be any change in these rights after the Declaration of Peace.*

To answer this question it is necessary to consider the first paragraph of Section 11, and also the second proviso to the Section. On another aspect of the matter it will be necessary to see what was said in Parliament when the Act was being passed, and what was the understanding of those interested as to the meaning of the Section.

Section 11 of the original 1919 Act was as follows:—

> 11. (First Clause).—(1) The Comission shall award pensions to or in respect of members of the forces who have suffered *disability*, in accordance with the rates set out in Schedule A of this Act, and in respect of members of the forces who have died, in accordance with the rates set

out in Schedule B of this Act, *when the disability or death in respect of which the application for pension is made was attributable to or was incurred or aggravated during Military Service.*

(First Proviso).—(Proviso that members of the forces on occupational leave not pensionable unless disability or death attributable to military service.)

(Second Proviso).—Provided, further, that when a member of the forces has suffered disability or death after the Declaration of Peace, no pension shall be paid unless such disability was incurred or aggravated, or such death occurred, as the direct result of military service.

PENSIONS BOARD'S INTERPRETATION OF SECTION 11

According to the evidence, the Pensions Board considered that, up to the date of the Declaration of Peace, the first paragraph of Section 11 included the following classes which were pensionable for disabilities or deaths:—

Disabilities.—(1) Those who suffered a disability which was "attributable to service" (Due to service principle).

NOTE.—There is no complaint as to the interpretation of the Section respecting this class. If the discharged man can show that the disability was caused by service, no matter when the disability occurs, he is pensionable.

(2) Those who suffered a disability which was "incurred or aggravated during" service (Insurance Principle).

There are two classes of these, viz:—

(*a*) Disabilities apparent at the time of discharge.
(*b*) Disabilities showing themselves after discharge.

The latter are the difficult cases. They should, in view of the ruling of the Pensions Board, be divided into two sub-classes:—

(*i*) *Continuous disability cases i.e.* those who can show that the disability which has appeared after discharge was really "incurred during" service, by evidence that the disabling condition has been continuously present, although perhaps in a very small degree, back to the time of discharge.

This class was pensionable because the disability was really "incurred during" service.

(ii) *Non-continuous disability or "missing link cases,"* i.e., those who had a disability appearing after discharge due to something which happened on, but was not caused by service, but who could not show that there was an actual disability at discharge. In other words, a flare-up or recurrence of a war time disability with no disability in the meantime.

The Pensions Board considered that these "missing link" cases would be pensionable under the first paragraph of Section 11 of the 1919 Act, but as will be seen hereafter, it contends that the 1920 amendments cut these off. (See Pensions Board Statement filed on the investigation Ex. H.D.D. "A").

NOTE.—The use of the word "incurred" in the Statute leaves some doubt as to whether the Statute really required that the disability had to be continuous to be pensionable. If a disability flared up or developed after discharge, and if it could be shown that it was caused by something which happened on service, then it would seem that the disability was "incurred" during service. In other words, the time when a disability is "incurred" is not when the actual disabling condition develops, but when the event happens from which the soldier "becomes liable" to develop a disability. It must have been on this interpretation of the word "incurred" that the 'missing link cases" were pensionable up to the time of the 1920 amendments, because the very essence of these cases was that

there was no disability at the time of discharge. On the other hand it is quite possible that on a strict construction of the Statute the fact that there was no disability on discharge would preclude pension in these cases, but the Commission has assumed that pension would be granted because of the statement by the Pensions Board (Ex H.D.D."A") that if such a disability appeared before September 1st, 1920, it would be pensionable.

As will be seen, almost a hair line divided the "continuous disability cases" from the "missing link cases." All that is needed to transfer a "missing link case" into the "continuous disability" class is the finding by the Pensions Board on the opinion of its medical adviser, or on some other satisfactory evidence, that some disabling condition existed at the time of discharge, no matter how slight or dormant or latent that condition may have been. This supplies the "missing link" in the chain of continuity.

Deaths.—Pensions were awarded to dependents when the death was "attributable to" or was "incurred" or "aggravated" during military service.

The Pensions Board interpreted this as meaning that a widow other dependent was entitled to a pension if;—

(*a*) the death was "attributable to" service, i.e. where military service itself caused or contributed to the death (Due to service principle) or
(*b*) the death resulted from something which was "incurred" or "aggravated" during service, i.e. something which, although unconnected entirely with military duty, happened during the service period (Insurance Principle).

This latter class is the other class of cases claimed to have been prejudiced by the amendments of 1920. The cases in this class will be referred to as "dependents claims for deaths from disabilities incurred during service."

DIVERGENT VIEWS AS TO THE MEANING OF SECTION 11

The foregoing sets out what in practice the Pensions Board considered to be the rights of discharged men and their dependents under the first paragraph of Section 11, but it now contends that, as to the "missing link cases" and the "dependents cases," the "Insurance Principle" was only to apply up to the date of the Declaration of Peace, and that as to deaths or disabilities occurring after that date, the "due to service" principle was to apply. It claims that this was the effect of the second proviso to Section 11 which quoted above. This proviso will be dealt with more fully hereafter.

On the other hand, the G.W.V.A. asserts that the rights above enumerated were granted by Parliament to discharged C.E.F. men and their dependents without any idea of withdrawing them later, and that the second proviso with its "due to service" principle only applied to those who were serving at the date of the Declaration of Peace, that is, those who elected to remain in the service under peace conditions.

The decision as to which of these contentions is correct is important because the claim of the G.W.V.A. is that the 1920 amendments changed the law by cutting off these two classes from the "Insurance Principle" after September 1, 1920; but if, as asserted by the Pensions Board, the 1919 Act had already cut them off after the Declaration of Peace, then the only change would be that the 1920 Act fixed a definite date for shutting out these classes, while the 1919 Act left the date to depend on the Declaration of Peace.

The G.W.V.A. says that the correctness of its contention that the second proviso to section 11 did not and was not intended to affect discharged C.E.F. men and their dependents is shown by:—

(1) The Statute itself;
(2) The discussion in Parliament;
(3) The lack of apparent reason for discriminating against a soldier or his dependents simply because disability or death occurred after a certain date, where the disability or death had exactly the same relation to war service, and orignated under exactly the same risks as a disability or death which had occurred before that date.

The second question for report is whether the rights of discharged C.E.F. men and their dependents under section 11 of the 1919 Act were adversely affected by the 1920 amendments, and it is obvious that before this can be determined it is necessary to decide these conflicting contentions as to what the rights under section 11 of the 1919 Act really were.

Taking up the points of the G.W.V.A. in order:—

1. What is the meaning of the 1919 Statute itself? Did the second proviso to section 11 by its terms include discharged C.E.F. men and their dependents?

The section and the proviso are here repeated:—

> (First Clause).—11. (1) The Commission shall award pensions to or in respect of *members of the forces* who have suffered disability, in accordance with the rates set out in Schedule A of this Act, and in respect of members of the forces who have died, in accordance with the rates set out in Schedule B of this Act, when the disability or death in respect of which the application for pension is made was attributable to or *was incurred or aggravated during* military service.
>
> (First Proviso).—(Proviso applying the "due to service" principle to soldiers on occupational leave.)
>
> (Second Proviso).—Provided further that when a *member of the forces* has suffered disability or death after the *Declaration of Peace*, no pension shall be paid unless such disability was incurred or aggravated or such death occurred as the *direct result of military service*.

The words "members of the forces" in this section refer in their plain English sense to men on service and not to discharged men, but the interpretation section (2 (i)) defines "members of the forces," and it appears that at least two distinct classes are designated under the same phrase.

Section 2 (i) of the original 1919 Act is as follows:—

> 2 (2), "members of the forces" means any person who was enlisted, enrolled or drafted during the war;
>
> (i) for service in the military forces of Canada on active service;
>
> (ii) for service on the high seas in the naval forces of Canada;
>
> (iii) for service in the air forces of Canada;; Provided however that after the *Declaration of Peace* the words "*member of the forces*" *shall not extend to or include any person who*, notwithstanding that he was so enlisted, enrolled or drafted, *is not at the time serving* by virtue only of the Military Service Act, 1917, or under an attestation or declaration in which he expressed his readiness to serve overseas or on the high seas.

To paraphrase (leaving out the classes unnecessary for this discussion):—
"Member of the forces" means:
(1) Everybody who was enlisted, enrolled or drafted during the war in the military, naval or air forces of Canada (the words "who was" would include discharged men);

(2) Provided that after the Declaration of Peace only those who were *at the time serving* under the Military Service Act or under an overseas attestation are included in the term "member of the forces." (This excludes members of the Permanent Force.)

It seems clear, and was admitted by counsel for the Pension Board on the investigation, that when read literally the second proviso to section 11 did not include previously discharged C.E.F. men, because they were not "serving" at the time of the Declaration of Peace, and were therefore excluded from the term "member of the forces" by the express words of the proviso in the definition quoted above. This was sufficient to support the G.W.V.A.'s contention as to the construction of the Statute. But counsel for the Pensions Board contended that the G.W.V.A. had by this construction proved too much, and that if, after the Declaration of Peace, the phrase "member of the forces" where it appears in the second proviso to section 11 did not include previously discharged C.E.F. men, then after the Declaration of Peace they would also be excluded from the pensions granted by the first clause of the section. It was claimed that the Pensions Board had not adopted this construction which would have the totally unanticipated effect of cutting off discharged C.E.F. men from any Pension after the Declaration of Peace, and that having given these men the benefit of the first clause of section 11, which is the clause authorizing pensions, they should also be included in the restrictive terms of the second proviso.

The answer of the G.W.V.A. to this contention was that if, in order to carry out the unquestioned intention to benefit discharged C.E.F. men, after as well as before the Declaration of Peace, it did become necessary to extend the definition of "member of the forces," it was only permissible to do that so far as was necessary to supply the omission, and that there is no principle of interpretation which justified carrying the construction further and subjecting these men and their dependents to restrictions which by their very term only applied to men who were still serving.

In the opinion of the Commission this contention on behalf of the Pensions Board, and the answer of the G.W.V.A., need not enter into consideration. There is no evidence that any conscious difficulty was experienced by the Pensions Board in finding authority for granting pensions to discharged C.E.F. men and their dependents after January 10, 1920, which was the then supposed date of the Declaration of Peace. Although the evidence is conflicting, (see Record p. 405, 414, 994 and 1143), yet the Commission concludes that in the administration of the Act as a general rule no notice was taken either of the supposed passing of the date of the Declaration of Peace or of the terms of the second proviso to section 11; the reason being apparently that the 1920 amendment was contemplated and this would fix a definite date for whatever change was to take place at the date of the Declaration of Peace. There was one case put in evidence (see Record p. 328), where death occurred after January 10, 1920, and prior to the passing of the 1920 amendments, and in which pension was refused because the death was not the "Direct result of Military Service," and the second proviso to section 11 was quoted, but the Commission considers that this case was the exception rather than the rule; as a matter of fact pension was eventually conceded in this case on other grounds.

As has already been said, it is admittedly clear that the second proviso, when read with the second part of the definition of "member of the forces," did not include discharged C.E.F. men and, therefore, these men were not, by the terms of the 1919 Act, made subject to the "due to service" principle when the Declaration of Peace came.

In the opinion of the Commission this interpretation is not affected by the consideration that it may be difficult to find within the four corners of the

Statute authority to pay pensions to previously discharged C.E.F. men after the Declaration of Peace. The intention that men discharged previous to the Declaration of Peace should be paid pensions after as well as before that date is unanswerably shown by the fact that such pensions have been granted under the Act for three years, and without question. The 1919 Act is the only Act which authorized the granting of pensions on the "Insurance Principle," and pensions on that principle have been granted constantly since the Declaration of Peace to continuous disability cases. When to this ex post facto evidence of intention is added the consideration that the necessary object of pension legislation was to grant pensions to ex-service men and their dependents, it becomes unthinkable that Parliament ever intended to say that a discharged C.E.F. man and his dependents would lose all their right to pension, even for disability or death resulting from service wounds, simply because the disability did not appear, or the death did not occur, until after the Declaration of Peace; and yet this would be the admitted effect if the same definition of "member of the forces," which is applicable to the second proviso, were used in the first clause of section 11.

The Commission considers that it is possible to read the Statute itself so as to carry out this intention, and that the common-sense construction must be that the first definition of "member of the forces" (which includes all who had enlisted whether actually serving or not) is the definition applicable to "member of the forces" in the first clause of section 11, and that this clause created for these men at the time of their discharge, as well as for their dependents, a vested right to pension for disability or death from anything originating on service—no matter when the application was made, and that the "after the Declaration of Peace," "member of the forces," as defined by the second half of the definition (i.e. those *still serving* at the Declaration of Peace), was the only class shut out by the second proviso from the "Insurance Principle," after the Declaration of Peace. In other words, it is suggested that the second definition of "member of the forces," should be construed as if it read as follows, the words in brackets being inserted by the Commission:—

> Provided, however, that (in the proviso to Section 11 respecting disability or death suffered) after the declaration of peace, the words "member of the forces" shall not extend to or include any person not at the time serving, etc.

The result of this interpretation is that C.E.F. men discharged before the Declaration of Peace, and their dependents, have preserved for them their rights under the "Insurance Principle" acquired under the first paragraph of Section 11, while a limited class, namely those who continue to serve after peace is declared, are pensioned on the "due to service" principle for disabilities or death suffered on peace time duty.

Therefore, on the first point made by the G.W.V.A. as to the meaning of Section 11, the Commission concludes that the terms of the proviso to Section 11 of the 1919 Pension Act did not deprive discharged C.E.F. men and their dependents of the benefits of the "Insurance Principle," but only affected men still serving after the Declaration of Peace, under peace conditions, and that this conclusion can be arrived at without adopting the suggested startling interpretation that, if the proviso does not apply to discharged C.E.F. men and their dependents, they lose the benefit of the whole Statute.

2. The next point made by the G.W.V.A. is that the above is the only construction consistent with the explanation made in Parliament at the time the second proviso to Section 11 was inserted. The Commission has not over-

looked the elementary rule which requires that the intent of the legislature be ascertained primarily from the Statute itself, but this investigation involves not simply the strict legal construction of the enactment but also the general statements made as to the affect of this Pension legislation, and it is considered that the public declaration of those who took part in its enactment, and the way in which it was apparently understood by them and by the representatives of those affected by it, is material in considering the principle on which the Act should be administered and in order to throw light on the subsequent legislation and on the circumstances under which the matters now under investigations arose.

The Bill was in charge of Hon. Mr. Rowell, and the following extract from Hansard 1919, at page 4179 (Record p. 116) shows very clearly that the man from whom the "Insurance Principle" was going to be withdrawn was not the discharged C.E.F. man, but the man who elected to remain in the service after the Declaration of Peace:

> Mr. ROWELL: I move to amend Section 11 by adding at the end of the first sub-section the following, "Provided further that when a "member of the forces" has suffered disability or death after the Declaration of Peace, no pension shall be paid unless such disability was incurred or aggravated, or such death occurred as the direct result of military service.
>
> I am transferring to this section an important part of the clause we struck out of (*g*) in Section 2.
>
> Mr. LEMIEUX: What is the explanation?
>
> Mr. ROWELL: Under the law as it now stands our pension system is really an insurance, that is, if a man dies from any cause during service his dependents are entitled to a pension. The view of the Committee was that after peace is proclaimed, *if men are kept in the service for the purpose of clearing up fag ends, etc., during peace, the insurance element should be eliminated.*
>
> Mr. LEMIEUX: On the other side too?
>
> Mr. ROWELL: *Either overseas or here. After peace is proclaimed the insurance element will be eliminated.* The man will become entitled to pension if his disability was the direct result of service.
>
> Mr. LEMIEUX: Suppose the soldier *is kept in France with a regiment to collect the debris of the war* and in connection with that work he received a serious wound. In that case I suppose he will be considered as having been wounded in the performance of war service.
>
> Mr. ROWELL: Yes, he would get a pension.
>
> Mr. LEMIEUX: What the Minister means is that if while *engaged in the discharge of his duties* he dies a natural death from illness contracted outside of military function, the provision he mentions applies?
>
> Mr. ROWELL: Yes.
>
> Mr. GRIESBACH: *Surely there will not be many of these cases.* Why introduce that element?
>
> Mr. ROWELL: Our law as it stands is broader than the pension law in any other country, so far as we know. The insurance feature which I have mentioned is not in any other law, so far as I am aware. *In that respect we give the soldier the benefit of insurance during the whole period of the war.*
>
> Mr. GRIESBACH: That is the principle that underlies all pensions.

> Mr. ROWELL: No, the principle underlying all pensions is disability due to service. *Under our pension law, if a soldier contracts disease under a purely normal condition, having no relation at all to service, he becomes entitled to pension. It is really an insurance system.*

The underlying idea was that the "Insurance Principle" applied to war-time service only, and that as to men serving under peace-time conditions, the "due to service" principle was to be applied. There certainly is no suggestion that discharged C.E.F. men and their dependents were going to have withdrawn from them rights arising from war-time disabilities.

At least some of the confusion as to the interpretation of the Act arose from the very involved definition of "member of the forces" in section 2 (i) above quoted, and the difficulties of draughtsmanship were very candidly and frankly described to the Commission by Mr. Kenneth Archibald, the legal advisor of the Pensions Board at the time of the Act of 1919 was being drafted and considered (Record p. 1170). (The proviso referred to is the proviso to the definition of "member of the forces"):—

> Q. There is no question in your mind, speaking as a lawyer, that that proviso as it stood when it was enacted cut out men who had been discharged did it not?—A. I think that you could make a very good case if you want to argue that, but you must take the whole intention of the law, and it is quite clear that the whole intention of this Act was to continue to look after men who had fought in the war, whether they were discharged or undischarged, and I think from that point of view the word "is" must be read to mean "is or has been."
>
> Q. What is the word "only" put in there for? I never understood it.—A. I never understood the word "only" either. That was one of the words that I asked about. But the fact is that the proviso was drafted by one man; I never saw him after he had left the Department; he, however, passed it along to the second man; the second man discussed it with me, and I asked him "what does the word 'only' mean"? He said: Oh, I think it is all right. I don't know whether it has got any clear meaning. It doesn't do any harm anyway. Well, that was the idea; let us get this thing . . . . we were nearly finished; and that was one of the last things we were fighting on . . . . "Let us get it finished." And as a fact I could not do anything else than accept this. But I tried to have that whole proviso struck out. When I could not have it struck out then, in a way I didn't care so much what it meant. I was very strong on the principle . . . . I don't know how often I have enunciated it . . . . equal disability equal remuneration. (Mr. Archibald goes on to show his reason for contending that the Permanent Force should have been included as well.)

With the situation described by Mr. Archibald, the Commission considers that it is at least more probable that members of Parliament, as well as returned soldiers' representatives, would take the interpretation of the statute as clearly expressed by Hon. Mr. Rowell and Mr. Lemieux, and as clearly understood by General Griesbach, rather than enter upon an exhaustive study of a statute so involved as to make it difficult for even the legal advisor of the Pensions Board to clearly apprehend its meaning. Judge Margeson (Record p. 1034) says: "It is a hard Act to interpret this 1919 Act; there is no question about that."

The Commission sustains the contention of the G.W.V.A. that the second proviso to section 11 was not understood as applying to previously discharged C.E.F. men or their dependents.

3. The G.W.V.A. further contends that there is no apparent reason why, after the Declaration of Peace, the "Insurance Principle" should have been abrogated, so far as previously discharged C.E.F. men were concerned, for disabilities or deaths connected with service.

As has been said, Canada had, by her Pension Law, virtually issued insurance policies to her soldiers against disabilities or death resulting from what happened on service. There can, it seems, be no reason why these policies should have been cancelled until at least a reasonable time had elapsed within which service disabilities should in all probability have become apparent. The essential factor is a disability arising out of the period of service. The actual time when the disability is plainly manifest, or the death actually occurs, is beyond the soldier's control. A man who is fortunate enough to have the flaring up of his disabling condition, arising out of his period of service, delayed beyond a certain date, should not have his good fortune turned into misfortune by being refused a pension when, if the disabling condition had developed previous to that date, he would have been pensionable. On the other hand it must be recognized that there should be some time when it can be fairly assumed that all disabilities have shown themselves which have any reasonable likelihood of being connected with service, but this time would have no relation whatever to the date of the Declaration of Peace, and the Commission can only assume that the limitation of time fixed in section 13 of the Pensions Act of 1919 was to bar these stale claims.

But it seems even more unlikely that it could have been intended that a wife and children were to be deprived of pension for no other reason than that they had cared so well for the husband and father, that his life was prolonged until after the date of the Declaration of Peace, whereas, if they had neglected him and he had died before that date, they would have received a pension; but this admittedly would be the effect of applying the second proviso of Section 11 to previously discharged C.E.F. men.

As was pointed out, another illustration of the peculiar effect thus produced was that a soldier discharged before the Declaration of Peace might be receiving from time of discharge up to his death a Pension for, say 75 per cent disability, incurred during but not caused by service, this Pension also would include allowances for the wife and children; nevertheless, if the soldier died after the Declaration of Peace, his wife and children would be refused Pension even though the death was caused by the very disability for which the husband and father had been pensioned. There was, however, an exception to this where the soldier had been receiving at the time of his death pension for an 80 per cent or greater disability. In that case his dependents would be pensionable if he died within five years of the date of discharge, or of the date when he commenced to draw pension (See Section 33 (2)).

The reason suggested in the evidence of His Honour Judge Margeson, for the apparent anomaly as to dependents, was that the Returned Soldiers' Insurance Act was in contemplation to take care of these cases (see Record p. 1026); but the Insurance Act was not passed until a year later (1920), and it would hardly be supposed that the country, having given in effect free insurance by virtue of its pension law, was at this comparatively early date, and without clear and very specific notice to those affected, going to withdraw that benefit and substitute a system of insurance for which men must pay.

The Commission considers that there is no evidence to indicate that there was, at the time of the passing of the 1919 Act, any apparent reason why discharged C.E.F. men or their dependents should be deprived of the "Insurance Principle" at the date of the Declaration of Peace, when this particular date was not even known at that time, and it could have no logical relation whatever

to the time within which it would be reasonable to expect the development of a war-time disability, or the occurrence of a death caused by such disability.

In addition to the foregoing considerations as to the effect of the second proviso to Section 11, evidence was given by Judge J. W. Margeson, Col. C. W. Belton and Mr. Kenneth Archibald, as to their understanding of the purpose of this proviso.

Judge Margeson was a member of the Pensions Board from August 2, 1919, to January, 1921.

Col. Belton had had an unusually long experience in pension matters. He had been with the Pensions and Claims Branch of the Department of Militia from August 7, 1915, and was acting Pension Commissioner for three months until the original Pensions Board was appointed about June, 1916. He had been transferred from the Militia Department at the request of the Pension Board, served as sole Medical Adviser of the Pensions Board for about one year, and continued as Child Medical Adviser until the control of the staff passed to the D.S.C.R., in 1921, when he was transferred to Toronto as a Pensions Examiner, which position he now holds.

Mr. Archibald had been the legal adviser to the Pensions Board from November 7, 1916, to January, 1921, and had the burden of endeavouring to co-ordinate the many different views in connection with the drafting of the new 1919 Act. His designation during a portion of the time was Director of the Pensions Board. On September 7, 1920, he was appointed an Acting Commissioner, which position he held until he severed his connection with the Pensions Board in January, 1921.

While the evidence of these gentlemen illustrates the difficulties involved in legislation of this kind, it does not indicate any consensus of idea by the Pensions Board or its staff respecting this proviso. The Commission thinks it is not sufficiently useful to quote in full the evidence of these gentlemen, but contents itself with giving references and simply stating the impressions received from the statements made.

Judge Margeson was very clearly of opinion that it was in mind that the "Insurance Principle" was to be definitely abrogated at the date of the Declaration of Peace, both as to discharged C.E.F. men as well as their dependents, and he refers to the Insurance Act as being in contemplation then as a substitute concession for the benefit of dependents.

The Act was discussed in March, April and May, 1919, and assented to on July 7, 1919, while Judge Margeson was not a member of the Board until August, 1919; further, as has already been referred to, the second proviso to Section 11 of the 1919 Act was never put in force, so that it is to be assumed that Judge Margeson is speaking more particularly of the idea which the Pensions Board had in mind at the time of the amendments of 1920.

Judge Margeson's evidence is found on pages 1020, 1021, 1024 and 1025 of the Record.

Col. Belton, who was Chief Medical Adviser of the Pensions Board at the time (as well as before and after) the Statute of 1919 was passed, is, on the other hand, equally positive that it was never contemplated by the second proviso to Section 11 to affect either the previously discharged C.E.F. man or his dependents, and he says he was astonished when he heard of it. His evidence is to be found on pages 1132, 1133, 1152, 1154, and 1163 of the Record.

Mr. Archibald, the legal adviser and draughtsman of the Pension Act, takes middle ground between the impressions of Judge Margeson and Col. Belton. Mr. Archibald's idea seemed to be to the effect that the second proviso to Section 11 would affect the discharged C.E.F. man himself but was not intended to affect

the rights of dependents. Portions of Mr. Archibald's evidence are quoted below:—

By Col. McKeown: (Record p. 1191)

Q. I did not think you would take away any rights which the C.E.F. man enjoyed previously.

Mr. Archibald replied:

A. No, if the C.E.F. man wanted to *stay in the army after the war was over* he was staying not because of the war but because he had a job and he should not be considered in any different sense than the permanent force.

By the Chairman:

But the man who was discharged, he had rights and nobody was going to take away his rights or the dependents'. You did not think of the Declaration of Peace coming along.

WITNESS: *I never thought of the Declaration of Peace affecting anything that could be definitely related or joined up with the war.*

These statements are to be taken with the further evidence of Mr. Archibald (See Record p. 1234):—

Q. I thought that you said yesterday that the discharged C.E.F. man was never in mind, and it was not intended to take away the right that the C.E.F. man had acquired to be insured for anything on service, and that this second proviso was only applied to men still remaining in the service?

A. Yes, what was thought of at the time *was not the C.E.F. man.* It was not *thought that he would be affected to any extent,* and they were not affected to *any extent,* but if this particular splinter case (a hypothetical case put by the Commission of a soldier getting a splinter in his hand while whittling for amusement—during service—the injury healing up—no disability at discharge—but flaring up after discharge) had been brought up before a Parliamentary Committee, I think I would have suggested that the man should not be pensioned if it came up after the Declaration of Peace. I think every single member of the Parliamentary Committee would agree with me.

Q. Even though it had been incurred during service?

A. That is to say, even though the splinter was incurred during service, but the *disability resulting from that splinter* came out after the Declaration of Peace.

This indicates that Mr. Archibald was expecting the "missing link cases" to be affected, after the Declaration of Peace, by this proviso.

On the other hand he considered it was never intended to take away the right of the dependents claiming in respect of deaths from disabilities incurred during service (see his evidence, Record p. 1216):—

WITNESS (Mr. Archibald): I see no reason why in principle, if you are going to pension a man because his disability grows greater after the Declaration of Peace, and you refuse to pension his widow when he dies as a result of his disability growing greater, then I think you are applying one principle to one person and another principle to another person.

By the Chairman:

Q. You do not think that is throwing the door open too wide?

A. I do not think it provided this idea of continuity—

Q. —is adhered to?

A. —is stuck to.

and also Record p. 1244 referring to the widow being deprived of pension because the husband died a day too late:

> Q. And you say that that anomaly, so far as you know, was never intended by anybody?
>
> A. No, I do not think that it was ever intended to take away the rights of the woman to prove *definite continuity* between the service disability or the *disability incurred on service*, and the death. *I do not think we intended to take away her rights to do that, although it is taken away by the law.*
>
> (See also Record p. 1242 and 1243.)

Mr. Archibald, in his annotations to the Pensions Act (ex H.D.D. 49), said (in summarizing the effect of Section 11):—

> 4. Those who are disabled after discharge must prove that the disability was due to service.

All this evidence demonstrates that there was a vital difference of opinion, even between those who had to do with the administration of the 1919 Act, as to whether the abrogation of the "Insurance Principle" in the second proviso to Section 11 was to affect discharged C.E.F. men.

Conclusion as to the first question for consideration.—The answer to the first question is that, in the opinion of the Commission, Section 11 in the 1919 Act gave to discharged C.E.F. men and their dependents the right to pensions on the "Insurance Principle," and that the date of the Declaration of Peace was not to affect or change these rights as to those who had previously been discharged or their dependents.

(2). *Were the rights of discharged men and their dependents adversely affected by the 1920 amendments, and if so in what respect and as to what classes?*

In 1920 the Pensions Board had presented to Parliament the amendments quoted below (among others) which were passed. The changes made by these amendments were as follows:

(*a*) The term "member of the forces" was extended to include the Permanent Force. This was accomplished by striking out the old definition and substituting the following:—

> 2. (*i*) "Member of the forces" means any person who *has served* in the naval, military or air forces of Canada *since the commencement of the war.*"

(*b*) The principle on which pensions were to be granted in future was the "due to service" principle. To effect this change the old Section 11 with its provisos was struck out and the following substituted:—

> 11. The Commission shall award pensions to or in respect of members of the forces who have suffered disability, in accordance with the rates set out in Schedule A of this Act, and in respect of members of the forces who have died, in accordance with the rates set out in Schedule B of this Act, when the disability or death in respect of which the application for pension is made was *attributable to* military service.

(*c*) As to disabilities or deaths occurring before the amending Act came into force (Sept. 1, 1920) the old provisions of Section 11 were still to prevail.

This was accomplished by inserting the following as Section 29 of the amending Act:

> 29. All cases affected by this Act shall be reviewed and future payments shall be made at the rates and in accordance with the provisions set forth herein. Provided that *when death or disability has occurred previous to the coming into force of this Act*, the provisions of this Act shall not operate to remove from any applicant for pension *any rights which he had in virtue of the Pension Act.*

Conclusion as to the second question for consideration.—In answer to this question it can be stated that, as will appear hereafter, these amendments, as interpreted eventually by the Pensions Board, did adversely affect the rights which, in the opinion of the Commission, had been granted under Section 11 of the 1919 Act to two classes, viz:

(*a*) The dependents' claims for deaths from disabilities incurred during service (unless the soldier was receiving pension of 80 per cent or more previously to his death):

(*b*) The Missing Link Cases.

(3). *Was it represented by the Pensions Board, before the 1920 Parliamentary Committee, that these rights would not be adversely affected?*

The claim of the G.W.V.A. is:—

That the general change to the "due to service" principle, which was affected by the 1920 amendments, was simply because the permanent force was being brought under the Act and that this reason was given before the 1920 Parliamentary Committee and was coupled with the assurance of the representatives of the Pension Board that C.E.F. men discharged before the declaration of peace, and their dependents, would not be affected by the amendments, but would have their rights under the Section 11 of the 1919 Act preserved.

It is obvious that, where the Pensions Board and the G.W.V.A. held distinctly different conceptions as to what rights were conferred by the 1919 Act, assurances that there would be no change would be meaningless.

Extracts from the proceedings of the Parliamentary Committee were quoted to show what was stated by the representatives of the Board of Pension Commissioners as to the purpose and effect of the amendments, but unfortunately there does not seem to have been any inquiry made before the Committee nor any definite statement elicited which would bring clearly to mind just what was the effect of the law as it existed. There certainly is nothing which suggests that because the declaration of peace was supposed to have passed, discharged C.E.F. men or their dependents were required to prove more than previously in order to be entitled to Pension.

As the whole contention of the G.W.V.A. depends to a very large extent on the understanding as to the 1920 amendments which their representatives received from those who spoke for the Pensions Board, before the 1920 Parliamentary Committee, it is necessary to examine in some detail just what was said.

Representations before 1920 Parliamentary Committee as to Purpose and Effect of Amendments.

Col. John Thompson D.S.O., Chairman of the Pension Board, (Record p. 408) Parliamentary Committee Proceedings 1920, p. 43) said:—

> "Most of the sections that we suggest amendments to refer to definitions of various parts of the statute, and we have recommended

one or two changes where we have thought it was rather working a hardship on the individuals concerned. With one or two exceptions, if these amendments go through there is absolutely no increase of liability on the part of the country to any very serious extent; on the other hand it will do justice to the individual, who, we understand, now needs it. Apart from that none of the recommendations affect the liability of the country one way or the other.

Col. Thompson stated before the Commission that in speaking of the increase or decrease in liability, he was not thinking particularly of Section 11, but had in mind the fact that the amendments did not involve an increase in pension rates (Record p. 409) or other cash outlay. The effect of the various amendments taken separately was gone over in the course of Col. Thompson's examination before the Commission and he was asked:— (Record p. 410 and 411).

Q. There are two things we have in mind, one is that the liability to the country was being substantially increased to include the members of the premanent force. The other is that the liability to the country was being to some extent decreased by a restriction of the test to overseas men. Did you have the idea that the amount of the decrease and the amount of the increase would about balance?—A. With regard to Section 11, I do not think it had any reference to it at all. I was referring entirely to the effect of the other changes.

By Col. Dubuc:

Q. Do you mean each individual change proposed without considering its reference to the others? As the Chairman has just asked you, they were passing those amendments and they wanted to know whether they would increase the country's liabilities so much, and whether other changes were going to decrease the liabilities so much, thus balancing it, so that finally, the country would be in about the same position so far as liabilities are concerned. Do you say that each individual amendment did not matter much, so far as liability went one way or the other? —A. I had reference particularly to *the inclusion of the permanent force*. At that time, I do not know whether it occurred to me whether there would be an increase or a decrease with regard to Section 11.

Col. Thompson in his evidence before the Commission also referred to the memorandum prepared by the Pensions Board, at the time the 1920 amendments were under consideration, and gave the following explanation of what was said before the Parliamentary committee:—

(Record, p. 404.)

That is why I read this memorandum, sir, paragraph 6, with regard to section 11, the last two lines: "Peace has now been declared and therefore the 'due to service' principle may now be applied." I had no particular reference to section 11, what I had reference to especially, in view of the data which the Parliamentary Committee had asked me to secure, was what I might call the immediate financial liability, such as increasing widow's pension from $40 to $48 or from $48 to $60 per month, and the bringing in of the permanent forces, who were formerly getting $264 per annum, and would now get so much more—a very considerable increase in liability.

The quotation first above set out (from Record, p. 408) appears to be the only statement which Col. Thompson, himself, made to the Parliamentary

Committee in reference to the amendments. His duties called him away and Judge Margeson took Col. Thompson's place before the Committee.

Mr. Ahern (the then Secretary of the Pensions Board) gave evidence before the 1920 Committee and was asked by the Chairman of the Committee in reference to the proposed new section 11: (See Record p. 82, 83, 877, 878 and 879), (Report of 1920 Committee, pp. 60 and 61):—

By the Chairman:

Mr. CRONYN, M.P.: That is one to consider in connection with the last amendment as to the definition of a member of the forces. Those of us who were on the Pensions Committee know that our orignal pensions scheme for the C.E.F. was a form of insurance because a man received a pension no matter how his disabilty arose. If it arose on service, or was aggravated during service, he received a pension without any question. As I understand it, and I would ask Mr. Ahern to correct me if I am wrong, *this amendment proposes to limit pensions to such cases as are incurred on service or are attributable to service.*

Mr. AHERN: That is the whole explanation.

By Mr. Arthurs:

Q. That was always the rule, was it not?—A. Any disabilty incurred on service was pensionable. Any man who was injured on service was pensioned, *but now the C.E.F. no longer exists*, and it is thought it would be unwise to keep that in the Act.

Q. Men who were in the C.E.F. might become disabilities in the future.—A. If they become pensioners, *it would be because of injury, disease, or disability incurred on service.* Under the old Act, if a man was on service and was knocked down by a street car, he was probably pensioned.

Q. Would this deprive him of that right?—A. *There is no C.E.F. now.*

Q. *It applies to members of the active militia?*—A. Yes.

Mr. NESBITT: This amendment works in with that other one we were discussing.

The CHAIRMAN: The difference is made clear in the concluding words of the two sections. As it reads now (quoting from Memo. prepared by the Pensions Board in reference to the amendments):

"In future pensions will be paid only when the disability or death in respect of which the application for pension is made was attributable to military service."

They leave out the words "incurred or aggravated during military service." This brings it into line with the general law of other countries. Ours was rather an exception.

By Mr. McGibbon:

Q. Would that not cut out a lot of men?—A. *It would only cut out men of the permanent force and others.* It is not the intention of this Act to pension men except for injuries or disability due to service.

Q. It would not be retroactive then?—A. No, in the case of any man who had been awarded a pension it would not change him at all.

Mr. NESBITT: It has simply changed the words "due to service."

The permanent force "and others" referred to by Mr. Ahern is probably explained on p. 59 of the 1920 Committee Proceedings (quoted hereafter), where the application of the amendments to the active militia and Mounted Police is discussed.

The Chairman of the 1920 Committee, Mr. Hume Cronyn, M.P., here gave an intimation as to the effect of the amendment, which seems to be the only clear-cut statement on the point. It showed definitely his personal idea that discharged men might be affected. No discussion developed, however, and this aspect apparently received no further attention during the proceedings of the Committee. The reference is as follows: (See 1920 Committee Proceedings, p. 61.)

> The CHAIRMAN: I think the question raised by Mr. Arthurs would come in here. If a man, member of the C.E.F., were knocked down by a tram car, we will say in England, and was not sufficiently injured to enable him to apply for a pension up to date, but subsequently his injury developed from that cause, I am inclined to think that under this amendment he would be cut out. That is my personal view.
>
> Mr. ARTHURS: That would be unfair to him.

This was, as it turns out, a very accurate description of the missing link case. If the man was "not sufficiently injured to enable him to apply for a pension up to date," then there was no disability at discharge.

It is quite conceivable that the significance of Mr. Cronyn's statement would be effectually neutralized by the statement of Judge Margeson, at p. 323 of the Committee Proceedings (Record, p. 85), which will be quoted below.

There was also a discussion with regard to the proposed amendment which defined "member of the forces": (See Proceedings of the Committee of 1920, pp. 58 and 59) as follows:—

> *By the Chairman:*
>
> Q. The next amendment is one that the Commission think of great importance. They have boiled down quite a lengthy definition to two or three lines. Perhaps Mr. Ahern will indicate why that change is made?—A. The explanation which you have, I think, defines it, or gives the reason very, very thoroughly. At the meeting last year of the Committee, pensions were made more or less wholly from a *point of view of the war*. Now the war is over and it is advisable that this include a *permanent force, headquarters force, and so on*. Otherwise under the old Act it simply meant *members of the C.E.F.*, and the C.E.F. no longer exists.
>
> *By Mr. McGibbon:*
>
> Q. This is extending it somewhat?—A. Yes. For instance, a man in the permanent force has been disabled on account of service and unless this Act was amended he would receive pension under the old Pensions Board, which I think would be $200 odd, total disability, whereas under this proposed amendment he would receive a pension at exactly the same rates as a member of the C.E.F.
>
> Q. Do I understand that that would bring in all your civil servants who were put into uniform?—A. *No, the permanent force of Canada.*

The implication of the above references obviously was that all necessary provision had already been made for the C.E.F. and that this amendment had to do with the permanent force.

The Chairman of the Parliamentary Committee also referred to the memorandum of the Pensions Board, presented to the Parliamentary Committee, containing the following explanation for the amendment to this definition (Page 59 of 1920 Committee Proceedings):

It is proposed to make the present pension Act applicable to all Canadian soldiers and sailors. It is proposed, however, not to pay pensions unless the disability, or death, was attributable to service."

By Mr. Green:

Q. Have you taken this particular point up with the Militia Department?—A. No, not to my knowledge.

Mr. NESBITT: The Militia Department brought in a Pension Act themselves.

Mr. Ross: This amendment looks very innocent on the face of it, but I would like to know its ramifications, just how far it extends.

By Mr. Ross:

Q. Can you detail the different services? It applies to the permanent force, does it?—A. The permanent force.

Q. How many are there on the permanent force?—A. I do not know.

Q. Who are next?—A. I presume the mounted police.

Mr. Ross: That would be 2,000 men.

Mr. REDMAN: It does not touch them.

Mr. AHERN: I am not an authority on that, I cannot tell you.

Mr. POWER: The active militia.

By Mr. McGibbon:

Q. Who suggested this?—A. It was suggested at a meeting of the Commissioners with the Director and myself.

Mr. Ross: I would suggest that some statement be prepared to show how far this will go; how many men it will affect, what cases it will deal with, and what branches of the service it includes.

The above also shows that it was the permanent force, and others then serving, who were being thought of in connection with the amendment.

The Commission considers that the matter is put beyond all reasonable doubt by the unqualified assurances set out at p. 323 and 324 of the 1920 Parliamentary Proceedings (Record p. 85) where Judge Margeson is speaking for the Pensions Board:—

By Mr. MacNeil:

Q. In the proposed amendment to section 11 you state that the pension awarded to or in respect of members of the forces who have suffered disability or death, each application for a pension must be on account of disability or death attributable to military service. I have received numerous communications in this regard, protesting against the deletion of the clause, "due to aggravation of service."—A. Prior to the late war pensions were paid for disabilities attributable to service. That was amended for soldiers disabled in the present war in order that pensions could be paid for disabilities whilst on service. It is now the intention I understand to return to the previous stand, that is that pensions should be paid for disabilities attributable to service.

Q. The point is raised that this constitutes a distinct breach of contract. The men enlisted on the understanding that if anything happened during the period of service the State would pension them?—A. *This will not affect late members of the Canadian Expeditionary Force injured during the war.*

By the Chairman:

Q. That was brought up before the Chairman of the Pensions Board, and he made the same statement, or Dr. Burgess made it then.

It is our understanding. We want it settled.— A. *It is not the intention to interfere with soldiers of the Canadian Expeditionary Force.*

Mr. MacNeil: It is clearly understood then that there will be no revision of pensions on this account.

By the Chairman:

Q. It is clearly understood, but I think it would be well to see that the Act could not be construed in any other way. Previous to the Great War pensions were paid only to men injured on service. The proposal of the Pensions Board is that we go back to the ordinary method of awarding pensions which prevails in all other countries where awards are only made for disabilities attributable to service, not incurred during service.—A. If that is read with the clause defining, "A member of the forces," I think that will.

Mr. Margeson: If there is any question about that I can assure you that when the final Act comes to be drawn up it will be carefully seen to that there is none in this war will have any rights taken away from him as far as aggravation is concerned.

By Mr. MacNeil:

Q. There will be no breach of contract?—A. *Absolutely none.*

Q. It is not so stated in the Act?—A. *Perhaps the Act is not clear in this respect but there was no doubt about our intentions when we gave it to the solicitor to draw up.*

Mr. Arthurs: That would be made abundantly clear.

The Chairman: *We agree to that and it must be noted.*

Mr. Margeson: *We are anxious to make this change because the permanent forces are brought under this Act. In our permanent Army we do not want the men to get a pension unless it is attributable to service.* If a man is in the permanent force and walks down street and gets hit by a street car, we do not think he should get a pension.

Mr. Arthurs: *What about a case of that kind if it happened in the war?*

Mr. Margeson: He would get a pension.

Q. An injury occuring while a man is on leave of absence is what I mean. If that does not include a man having a few days' furlough in England from the front, it should?—A. No, we do not take that into consideration.

Q. That is not the intention of the Act?—A. No, that is not the intention of the Act. A man has never been turned down for a pension for that.

Mr. Arthurs: That should be definite.

The Chairman: Yes, that section must cover a member of the forces on leave of absence during the late war. But if a member of the forces should while on leave engage in an occupation unconnected with military service, no pension should be paid for disability or death occuring during such leave unless the same was attributable to service.

If it had been intended to indicate that some different rule was to be applied to discharged C.E.F. men or their dependents simply because the declaration of peace had passed (as it was supposed), or if it had been in mind to amend the Act so that it would have that effect, it would certainly have been mentioned in this discussion, and it hardly needs any elaboration to indicate what Mr. MacNeil or anyone else would take from what was said.

In the opinion of the Commission the effect of the language was:—

> The change is being made because the permanent force is being brought in under the Act. Peace has now come and those who are serving will be serving under peace conditions. We do not consider that those serving under peace conditions should be pensioned unless the disability was attributable to service—A.C.E.F. man injured even while on leave would get a pension—(This must refer to a disability appearing in the future because the information was being asked for for the purpose of finding out what the situation would be if the amendments were passed) —It is not the intention to interfere with discharged C.E.F. men and if that is not clear it will be made clear.

It would seem unnecessary to quote further evidence on this point. Other reference are:—

> Major Burgess—Record ps. 93, 262, 263, 268, 269.
> Mr. MacNeil—Record ps. 94, 95, 98, 148, 356, 358, 359, 360, 361.
> Mr. Archibald—Record ps. 1194 to 1199.

There are, in the course of the proceedings quoted from, references to bringing into force or applying the "due to service" principle, but they are almost invariably coupled with some reference to the permanent force or men on duty, and in the opinion of the Commission did not give notice to the representatives of returned men that discharged C.E.F. men or their dependents were going to be affected as to anything which arose from what happened to them on war service.

Conclusion as the third question for consideration.—The Commission finds therefore that assurances were given by the Pensions Board before the 1920 Parliamentary Committee that the Amendments of 1920 would not affect the existing rights of discharged C.E.F. men, but that there was a great deal of confusion and no clear statement as to what these existing rights were supposed to be.

The Saving Clause—Section 29, Amendments 1920:—The section which was to provide the safeguard for C.E.F. men and their dependents was section 29. It is sufficient to say about this section that it failed to do all that had been promised before the Parliamentary Committee.

It was as follows:—

> 29. All cases affected by this Act shall be reviewed and future payments shall be made at the rates and inaccordance with the provisions set forth herein. *Provided that when death or disability has occurred previous to the coming into force of this Act, the provisions of this Act shall not operate to remove from any applicant for pension any rights which he had in virtue of the Pension Act.*

As this section has been construed by the Pensions Board, instead of protecting war service men generally as to disabilities or deaths due to something which had happened during service, it only protected an "applicant" who could accelerate the disability or death sufficiently to have it occur before September 1st, 1920 (the date of the coming into force of the Act.) If the disability or death occurred after that date, the "due to service" principle applied whether the applicant was a discharged C.E.F. man or a member of the permanent force.

It is quite possible that the section was drafted in this form because it had reference primarily to the men who were still serving at the date of the declar-

ation of peace, and who were intended to have been cut off from the "insurance principles" by the second proviso to Section 11 of the 1919 Act, but the trouble arises from the fact that the general term "applicant" caught discharged men and their dependents in the same dragnet with the permanent force and others. As appears now, there should have been a separate provision preserving the rights of C.E.F. men (and their dependents) who were discharged previous to the declaration of peace.

Anyone reading Section 29, without knowing the practice of the Pensions Board, would think that this cut out the "Insurance principle" as to all applications made after September 1st, 1920; but, as already pointed out, a disability which was complained of for the first time after September 1st, 1920, could, by the familiar process of proving continuity, be shown to have really occurred before that date, and therefore would come under the "Insurance Principle" of the 1919 Act; so that Section 29 did save the continuous disability cases.

As to dependents' claims, the Commission is of the opinion that it was not realized that these would be affected, the idea being that deaths occurring after September 1st, 1920, would be treated in the same way as continuous disability by showing that, although death actually happened after September 1st, 1920, it was due to and simply the culmination of a disability which had occurred previously to that date. Or in other words, that "the rights of the woman to prove definite continuity between the service disability or the disability incurred on service and the death" would be recognized. (See Record p. 1244). The evidence shows that the Pensions Board did not contemplate the possible strict construction which would cut off these dependents. Mr. Archibald, the draftsman of the Act, and who himself became an acting Commissioner within a week (Sept. 7th, 1920) after the amendments came into force, was asked (Record p. 1198:

> Q. The second proviso, or sub-section 3, as I understand, did contemplate the cutting out of the dependents of the discharged C.E.F. men from receiving pension in respect of disability incurred during service—in respect of death resulting from a disability incurred during service even though death occurred after the declaration of peace. That is what I understand you to say was the idea; *but you did not have that in mind?* —A. *No, I do not think that was contemplated.*
>
> Q. Did you in 1920, contemplate affecting these dependents?—A. *No, we did not contemplate affecting these dependents in 1920 either.*"

and also (Record p. 1199):

> *By Col. Dubuc:*
>
> Q. When you say "contemplated" do you say that you discussed it with the Pensions Board at the time and they neither contemplated that? —A. I do not know whether I discussed that—on that particular point. The declaration of peace was a thing of the future. We were talking of what we were doing then—this question of the pensioning of these women.
>
> Q. If you had the legal representation of the Pensions Board, you evidently reflected what their opinion was?—A. I think so.
>
> Q. When you say that you did not contemplate that, you mean equally that the Pensions Board of which you were an adviser did not either contemplate that?—A. Yes."

As to the "missing link" cases, there is no evidence that such a case had even been thought of. It must not be forgotten that this was only one year after general demobilization. Continuity would not be hard to prove in the case of a substantial disability, and there is no suggestion that the G.W.V.A.

had the slightest idea that any distinction would be made between continuous and non-continuous cases so long as it was shown that the disability was connected with the period of service.

The Commission is quite convinced that, notwithstanding what appears to be now a complete inconsistency between the representations made before the Parliamentary Committee and the Statute as passed and applied, there was no intention to conceal or deceive in any way. The Section itself was plain and the G.W.V.A. in order to make "assurance doubly sure," submitted questions in writing (Ex HDD 65) which were answered by the Pensions Board, and in these answers Section 29 was specifically referred to, and the inference was certainly made quite plain that as to deaths occurring after September 1, 1920, attributability to service would be required to be shown and no express distinction was made in this respect between discharged C.E.F. men and permanent force men; but there is this to be said, that when these cases were spoken of in the answers, there was generally some reference to the man concerned being on duty or still on service, and where the G.W.V.A. officials had in mind the assurances given before the Parliamentary Committee, and the fact that there were a certain number of men who had been still serving at the time of the Declaration of Peace who would be and were intended to be cut out from the "insurance principle" after September 1, 1920, it might easily not occur to them that there was nothing in these answers which expressly excluded discharged C.E.F. men from the application of the new principle. As a matter of fact, the only questions as to the effect of Section 11 which the G.W.V.A. put were as to pensions already granted, and of course it was replied, and quite properly, that these were not affected. No direct inquiry seems to have been made as to disabilities or deaths, in respect of C.E.F. men, occurring after September 1, 1920.

These questions were put and answered on July 12-14, 1920, after the amendments had been passed, and when there would have been no possibility, at least at that Parliamentary Session, of having any change made; but there is no evidence of the slightest protest or dissatisfaction with the answers which had been given, and it is evident to the Commission that the G.W.V.A. was quite satisfied with its idea of the way in which the Act would be administered in view of the assurances which had been received.

As it now appears, the Pensions Board considered that the date of the declaration of peace had passed on January 10, 1920, and they felt that by not making the amendments effective until September 1, 1920, they were allowing an extra few months to those who were to be cut off from the "insurance principle" after the Declaration of Peace, under the second proviso to Section 11. As was later learned, this was an error. His Majesty, the King, had made a Royal Proclamation under date of July 2, 1919, reciting the conclusion of the Treaty of Versailles and declaring that "upon the exchange of the ratifications hereof" the Treaty was to be observed. Again *The Times* of January 12, 1920, contained a Royal message from His Majesty, the King, to the Lord Mayor of London "on the ratification of the Peace" and referring to "this memorable hour when we are once again at peace with Germany." The official date of the "Termination of the Present War" was, however, declared by Imperial Order in Council of August 10, 1921, to be midnight, August 31, 1921.

It follows that, even if the contention now made on behalf of the Pensions Board were correct (viz., that the second proviso to Section 11 of the 1919 Act included not only men serving at the date of the declaration of peace, but discharged C.E.F. men, and their dependents as well), the Pensions Board unwittingly, by the amendments of 1920, accelerated the cutting off of these cases by one year.

Thus, on September 1, 1920, these amendments came into force, which were capable of an interpretation which would cut off from the "insurance principle" after that date the following:—

(*a*) The "missing link" cases;
(*b*) The dependents' claims for death from disabilities incurred during service; and
(*c*) Even if these classes had been cut out after the Declaration of Peace by the Pension Act of 1919, these amendments shut them out one year sooner than they otherwise would have been.

ACTION TAKEN BY THE PENSIONS BOARD FOLLOWING THE 1920 AMENDMENTS

The process whereby this construction was put into practice in the administration of the Act was a very gradual one.

The amendments were followed by an instruction sent out to the district offices which contained an obvious mis-statement as to disabilities and deaths incurred before September 1, 1920. This instruction did not discuss the question whether or not it was intended to treat deaths, actually occurring after September 1, 1920, as continuous with the disability occurring before that date and therefore pensionable. The words "future cases" might give ground for thinking that it was the cases originating in future which were to have the "due to service" principle applied, but the circular was in general simply confined to the terms used in the statute.

This instruction is contained in an office annotation to the 1920 Amendments (Ex HDD 15) and under the amended Section 11 it states:—

> The change made in Section 11 applies the "due to service" principle in all *future cases* but it is to be noted (See Section 29 of the amending Act) that cases in which the *death or disability occurred previous to September 1, 1920*, must be dealt with from the point of view of "*attributable to service*" *or* "*due to service*" in accordance with the Pension Act before its amendment. Provisos one and two which were struck out applied the "due to service" principle and therefore are no longer necessary. The previous subsection (2) applied the "insurance" or "during service" principle and therefore was struck out.

The phrases "attributable to service" and "due to service" as applying to death or disability occurring previously to September 1, 1920, are obviously wrong—the test for these cases was really whether they were "incurred during service".

The evidence given before the Commission by the Unit Medical Directors from the various provincial offices shows that they paid practically no attention to the instructions above quoted, and that they treated anything as "attributable to service" which could be traced back to anything which happened during service whether in the course of military duty or not. It remained then for the Pensions Board at Headquarters to apply the amended Act.

The dependents cases began to come up and it was evidently found that on a literal construction of Section 29, pension was not payable in these cases because the death actually occurred after September 1, 1920, although they would have been pensionable if the death had occurred before that date.

Under the circumstances, and in view of what had been said before the Parliamentary Committee, and where this state of affairs had not been contemplated, the Pensions Board would have been, in the opinion of the Commission, quite warranted if they had adopted what would no doubt be a strained,

but nevertheless a possible construction of the Act, and had granted pensions where death could be shown to have been continuous with and caused by a disability incurred on service; or in the alternative the decision might at least have been suspended in these cases, and the matter brought to the attention of the Government and of Parliament at the earliest opportunity. This was not done, but apparently as these cases came up they were dealt with and pension was refused, where the attributability of death to service could not be shown.

There are in evidence before the Commission some cases of this kind and Mr. Paton, the Secretary of the Pensions Board, stated (Record p. 1032) that he could produce many such.

The position taken by the Pensions Board on the investigation was simply that the Statute was there and they had to enforce it as it stood. Col. Thompson was asked if he considered it was the intention of Parliament that a widow should be pensionable if her husband died at two minutes before midnight on August 31, 1920, from cancer which appeared on service, and that a widow whose husband had exactly the same length of service under exactly similar circumstances, and died from the same cause three minutes later should not be pensioned, and his reply was, "I think so." He was evidently taking the strictly legal position that the intention was to be gathered from the words of the Statute itself, because when asked if he had inquired into the intention his reply was (Record, p. 424):—

> No, I have not inquired into it. I just interpret the Act. I do not pay any attention to what any member of the Pensions Committee may have thought about any proposed amendment or about any section or any legislation. I take the statute as I find it. I can show you quite a number of very extraordinary anomalies in the statute.

It is quite possible that there were numerous cases of dependents' claims which were saved by a wide construction of the words "attributable to service," and that it was not always required to be shown that the death was caused by actual military duty, if there was a chance to say that service conditions in the general sense might have contributed to the fatal result. If there was a tendency in this direction it was evidently intended to be checked by the amendment of 1921.

This amendment simply added the words "as such" after the words "attributable to military service" at the end of the new section 11 as passed in 1920. This made it clear that the cause of the disability or death must be actual military duty, and not simply the fact that a man was in uniform at the time.

The section as amended read as follows:

> 11. The Commission shall award pensions to or in respect of members of the forces who have suffered disability, in accordance with the rates set out in Schedule A of this Act, and in respect of members of the forces who have died, in accordance with the rates set out in Schedule B of this Act, when the disability or death in respect of which the application for pension is made, was attributable to military service *as such*.

Before the 1921 Committee, again the clear understanding was expressed that this "due to service" principle was being applied not to discharged C.E.F. men but to men on present military service.

See proceedings of 1921 Committee, page 105, (Record p. 105), where there is a discussion as to the effect of the addition of the words "as such." Colonel Thompson, the Chairman of the Pensions Board, and Dr. Burgess, one of the Pensions Board Assistant Medical Advisors, had explained the amendment and

then and there the acting Chairman of the Committee (Mr. Nesbitt) succinctly summed up the understanding of the effect of the amendment as follows:

> The ACTING CHAIRMAN: This proposed amendment only affects the present military service.

And no suggestion was made by any one that this summing up was not correct.

See also Record p. 106, where Mr. Cronyn, the Chairman of the Committee of the House, Hansard, 1921, p. 4365, explains the meaning of the addition of the words "as such."

> Mr. POWER: I would ask the Chairman of the Committee (Mr. Cronyn) to give some explanation of what is meant by the addition to clause 11 of the words "as such"? What is the meaning of the amendment?
>
> Mr. CRONYN: Section 11 of the original Act was amended at the last session of Parliament so as to read as follows:
>
> > The Commission shall award pensions to or in respect of members of the forces who have suffered disability, in accordance with the rates set out in schedule A of this Act and in respect of members of the forces who have died, in accordance with the rates set out in Schedule B of this Act, when the disability or death in respect of which the application for pension is made, was attributable to military service.
>
> Upon the advice or recommendation of the Pensions Board it is proposed to add to this provision the words "as such."
>
> Mr. POWER: Why military service "as such"? What is the distinction?
>
> Mr. CRONYN: I think my hon. friend will recall the discussions we have had in earlier committees on that point. Our Pension Act as distinct from the Acts of many other countries was virtually an insurance to the members of the Canadian Expeditionary Force. In other words: if those members, from almost any cause other than their wilful misconduct, were injured or killed during their period of service, they or their dependents received a pension. It was thought that since the cessation of the war that basis of pension should only be awarded *in respect of those who are still in the Military or Naval service of Canada*, if the accident arose from military service as such.

The amendment passed and was assented to June 4, 1921.

In the meantime the change of administration had taken place and the pensions staff in the various provinces had been absorbed by the D.S.C.R. with Dr. W. C. Arnold as Director of Medical Services. The instructions based on the 1921 amendments were therefore sent out, not directly by the Pensions Board, but through the D.S.C.R., and circular letter No. 1559 (Ex 19 H.D.D.) was sent out dated June 25, 1921, addressed to Unit Medical Directors and Medical Examiners and signed by Doctor Arnold. This circular assumes that second proviso to Section 11 of the 1919 Act did cut off ex-members of the forces and their dependents from the benefits of the "insurance principle" after the Declaration of Peace. It assumes that the Declaration of Peace was made on January 10, 1920. It takes no note of the contention now made that the amendment of 1920 had postponed until September 1, 1920, the coming into force of the restrictions of the second proviso to Section 11, because it expressly states that the change in the law was effective after January 10, 1920. The first paragraph shows that difficulty had been experienced in interpreting the

Act and this statement was intended to clear the atmosphere. The memorandum is quoted in full, but the marginal notes are inserted by the Commission to indicate what the Commission assumes to have been the authority for the statements in the respective paragraphs. The Commission has also indicated by an X, at the beginning of the paragraphs, those paragraphs which it is contended by the G.W.V.A. should not have been made applicable to men discharged before the Declaration of Peace, if the second proviso to Section 11 of the 1919 Act had been construed according to the intention of Parliament, and if the assurances as to the 1920 amendments not affecting discharged C.E.F. men had been carried out.

C.L. No. 1559

DEPARTMENT OF SOLDIERS' CIVIL RE-ESTABLISHMENT

OTTAWA, June 25/21.

To Unit Medical Directors and Medical Examiners.

Mark your reply
D.M.S.,
File 8-500.

Subject: *Section 11 of the Pension Act*

(Marginal Notes inserted by Commission)

There has apparently in the past been some doubt as to the interpretation of Section 11 of the Pension Act and its amendment. The Board of Pension Commissioners have therefore issued the following statement.

Medical Examiners in making recommendations having to do with pensions will be guided accordingly.

(1919, Sec. 11, 1st Clause)

1. Prior to and including the 10th of January, 1920, dependents were eligible for pension if death of the member of the forces occurred during service (misconduct excepted).

(1919, Sec. 11, 2nd Proviso)

X

2. After January 10, 1920, Declaration of Peace, dependents of ex-members of the forces were not pensionable unless the death was the direct result of military service (except dependents of pensioners in clauses 1-5).

(1921 Amendment to Sec. 11)

X

3. On and after the 1st day of September, 1921, dependents (except dependents of pensioners in classes 1-5) will not be pensionable unless death is attributable to military service, as such, which is practically the same as the law stood after January, 1920.

DISABILITY CLAIMS

(1919, Sec. 11, 1st Clause)

1. Prior to and including the 10th of January, 1920, members of the forces were pensionable if the disability was not caused by misconduct, was attributable to, incurred on or aggravated during service.

SESSIONAL PAPER No. 154

(1919, Sec. 11, 2nd Proviso)

X

2. A disability suffered after January 10, 1920, was not pensionable unless it was direct result of military service.

(1920 Amendment to Sec. 11)

X

3. A disability suffered on or after the 1st of September, 1920, was not pensionable unless the disability was attributable to military service.

(1921 Amendment to Sec. 11)

X

4. A disability suffered on or after the 1st of September, 1921, will be not pensionable unless it is due to military service, as such, which is practically the same as the direct result of military service.

W. C. ARNOLD,
Director of Medical Service.

A month later, under date of July 20, 1921 (Ex H.D.D. 27 and 30), the Assistant Deputy Minister of the D.S.C.R. issued to the Head of Branches, Ottawa, and to Unit Directors of Administration and Unit Medical Directors, an annotation which had been compiled by the Pensions Board on the amendments to the Pension Act for 1921. The covering letter was as follows:—

C.L. No. 1588.
OTTAWA, 20th July, 1921.

To Head of Branches, Ottawa,
Unit Directors of Administration,
Unit Medical Directors.

Mark Your Reply
For attention of Asst.
Deputy Minister.

Subject: *Amendments to Pension Act.*

Attached hereto are certain annotations on pension legislation *compiled by the Pensions Board for Canada* on the amendments to the Pension Act authorized at the recent session of Parliament.

E. H. SCAMMELL,
Assistant Deputy Minister.

P.R. 2887.

The annotation to Section 11 (the "as such" amendment) was as follows:—

Annotation on the amendments to the Pension Act, 1921

Here followed a verbatim quotation of Section 11 as amended with the following comment:—

The change in this section is by the addition of the words "as such" and emphasizes the fact that deaths or disabilities to become pensionable must be directly attributable to military service.

Up to this time apparently the G.W.V.A. had not realized that the "due to service" principle was being enforced against discharged men and their dependents, but about this time the change of policy began to be felt. Mr. C. G. MacNeil, the Dominion Secretary of the G.W.V.A., says in his evidence (Record p. 107):

Mr. MacNeil: It was found that during the latter part of 1921 and the commencement of 1922 the Board inaugurated a policy in respect of claims then being presented, demanding proof that the disability for which pensions were claimed was *attributable to military service as such.* This brought the point under dispute.

There is evidence to show that, even as lately as the present investigation, it was extremely difficult for even those who were administering the Act to keep clearly in mind what the rights of the discharged C.E.F. men were. It will be remembered that the Pensions Board practice was to pension a C.E.F. man, discharged before the Declaration of Peace, if he could show by the process of continuity that his disability was really incurred during service, but the effect of Dr. Burgess' evidence (Record p. 244-5) was that this man had to show that the disability was attributable to service.

Dr. Burgess' evidence was as follows:—

Q. Were you given any instructions of any kind with regard to dealing with C.E.F. cases after the amendment of September 1, 1921. That is to say, were your instructions, and was your understanding that a man applying after September 1st, 1920, had to show that his disability was attributable to military service?—A. Yes, that is my understanding.

Q. Before September 1st, 1920, it was sufficient if he showed that his disability was incurred on service?—A. Yes.

Q. Have you, so far as you are concerned, as one of the medical advisers, taken the view in connection with the C.E.F. men that after September 1st, 1920, they must show, or it must be shown that the disability was attributable to military service?—A. Yes.

Q. As compared with "incurred on military service"?—A. Yes.

Q. I presume that in your letter in reference to Cpl. Holmes, the words are advisedly used when you say that in this case his disability is not attributable to military service?—A. Yes.

Q. *Did you not mean "incurred on military service"?*—A. *No, attributable to.*

Q. *And you considered that a proper test to apply to the Holmes case?*—A. Yes.

Q. *Is that the test you applied all the way through to C.E.F. men?*—A. *I think so.*

Q. Do you know of any understanding, or any alleged understanding that these words "attributable to" were not to apply to C.E.F. men? Did you ever hear of that? Of course you would not be a party to it.—A. I do not quite catch your point. *Do you mean was it my understanding that a C.E.F. man who had a disability incurred on service "attributable to" did not apply to them?*

Q. Yes.—A. I did not understand that.

(See also Dr. Burgess' evidence Record, p. 255, where a similar statement of the practice is given.)

In view of all the evidence that has been given, the above was clearly not the practice nor the law, and notwithstanding this evidence the Commission does not think for a moment that Dr. Burgess himself strictly enforced this interpretation, even though, as will be referred to hereafter, he very frequently gave as the reason for refusing pension to C.E.F. men the fact that it was not shown that the disability was "directly attributable to service" or "directly the result of military service."

Dr. Burgess was the Assistant Medical Adviser who dealt with a great many of the difficult cases, and while much allowance can be made for the con-

fused state of affairs in view of the involved construction of the Act, at the same time it can hardly be wondered at that representatives of returned men found difficulty in understanding the principles on which the Act was being administered, and that, as Mr. MacNeil said, the awards were found not to be consistent.

In October, 1921, the mistake as to the date of the Declaration of Peace was evidently discovered and a minute was issued by the Secretary of the Pensions Board under date of October 22, 1921, (Ex 32 H.D.D.), addressed to the Deputy Minister D.S.C.R. revising the rulings which were contained in Dr. Arnold's circular letter No. 1559 (Ex 19, H.D.D.) and changing the date "January 10, 1920," (which had been previously assumed as the date of the Declaration of Peace) to read "August 31, 1920," the date when the "due to service" principle was brought into force by the 1920 amendments. A portion of this minute is quoted below. The Commission has inserted the marginal notes to indicate what the Commission assumes to have been the authority for the statements in the respective paragraphs. The Commission has also indicated by an X, at the beginning of the paragraph, those paragraphs which the G.W.V.A. contends should not have been made applicable to men discharged before the Declaration of Peace:—

Section 11 of the Pension Act.

By Imperial Order in Council dated August 10, 1921, the date of the "termination of the present war" is declared to be midnight, August 31, 1921. A previous Order in Council giving January 10, 1920, as the "termination of the war with Germany" has been accepted as the Declaration of Peace for the purpose of the Pension Act. This will have to be revised and the 31st August, 1921, substituted therefor.

Circular Letter No. 1559 should, therefore, be amended as follows:—
(Marginal notes inserted by Commission).
(1919 Act, Sec. 11 1920 Amd. S. 29).

DEATH CLAIMS

1. Prior to and including the 31st August, 1920, dependents were eligible for pension if the death of the member of the forces occurred during service.

(1920 Amendment New Sec. 11).

X 2. On and after September 1, 1920, dependents of ex-members of the forces were not pensionable unless the death was attributable to military service (except dependents of pensioners in Classes 1-5).

(1921 Amendment to S. 11)

X 3. On and after 1st of September, 1921, dependents (except dependents of pensioners in Classes 1-5) will not be pensionable unless death is attributable to military service as such.

DISABILITY CLAIMS

(1919 Act, Sec. 11, 1920 Act, Sec. 29).

1. Prior to and including the 31st August, 1920, members of the forces were pensionable if the disability was not caused by misconduct, was attributable to, incurred on or aggravated during service.

(1920 Amd. New Sec. 11).

X 2. A disability suffered on or after the 1st of September, 1920, was not pensionable unless the disability was attributable to military service.

(1921 Amd. to Sec. 11).

X 3. A disability suffered on or after the 1st of September, 1921, will not be pensionable unless it is due to military service as such.

Secretary,
Board of Pension Commissioners for Canada.

The effect of the above was that even if the "due to service" principle was to be applied to discharged C.E.F. men and their dependents, the amendments of 1920 had brought it in a year too soon.

There is no evidence of any steps being taken to bring these cases to the attention of the Government or of Parliament, for remedial action. Some of these cases are in evidence before the Commission, in fact in one case where death occurred before September 1, 1920, and pension had been refused in June, 1920, because it was not the direct result of military service, the matter was directly brought to the attention of the Pensions Board, after the issuance of the corrective Minute of October, 1921, and yet different letters were written to the G.W.V.A. in the early part of 1922 refusing pension, although it was admitted that the cause of the death arose or progressed on service—and it was not until June 15, 1922, and after further efforts of the G.W.V.A., that pension was at last granted to the widow—nine months after the mistake had been discovered, and two years after the death.

Practical Result—Extent to Which Cases Affected

After this necessarily intricate and tedious examination of the legislation, and the instructions issued thereon and the principles on which the Act was administered, the practical consideration is whether any appreciable number of cases have been adversely affected on account of the situation which has been detailed, although it is, of course, important if only one pension had been denied which should have been granted.

(1) *As to "Missing Link" Cases.*—One or two individual cases were actually put in evidence before the Commission which would admittedly have been pensionable under the original Pension Act if the second proviso to Section 11 had not been interpreted as applicable to discharged C.E.F. men, and Col. Thompson frankly admitted that there would be some cases which had been adversely decided because of this interpretation.

(2) *As to dependents' claims* for death from disability incurred during service, there were several of these put in evidence where pension was denied on account of death having occurred after September 1, 1920, but as to which it was admitted pension would have been granted if death had occurred before that date, and Mr. Paton said that (Record p. 1032) he had no doubt that he could produce many cases of this kind.

(3) As to accelerating the date of the Declaration of Peace, there were in evidence some cases where death had occurred between September 1, 1920, and September 1, 1921, and in which it was admitted that even if the second proviso Section 11 had applied, the dependents would have been pensioned if it had not been for the 1920 amendment which in effect brought on the date of the Declaration of Peace a year too soon.

It is to be remembered that the individual cases were cited before the Commission simply as type cases and not as exhaustive in any way of the classes they represented.

It can be safely assumed that there is a substantial number of dependents who already have been refused pension because of the 1920 amendments and new claims will continue to come up as deaths occur.

Cases Adversely Affected by Pensions Board's Statement to Applicants of the Reason for Refusing Pension

So far, the cases discussed have been those directly affected by the statute and the interpretation placed on it, and it has been assumed that the dependents' cases and the "missing link" cases have been the only ones in which the "insurance principle" has been denied. There is grave doubt, however, as to whether these have been the only cases. The general principle is that pension is not refused if the disability, although appearing after discharge, can be shown to be continuous with a disabling condition which was present at discharge; but a very large number of cases have been presented in evidence where discharged C.E.F. men have claimed pension for disabilities appearing after discharge, and the reply of the Pensions Board has been to these claims that it must be shown that the disability was "attributable to service as much" or "solely the result of his service" or "directly attributable to military service," or that "service itself" caused the disability, or some similar phrase has been used implying that "due to service" principle is the only one applicable.

It is admitted that this does not state the only ground on which pension may be claimed. It undoubtedly would be sufficient if it were shown that the disability was "attributable to service as such," but it is equally true that it is quite as sufficient to show that the disability now appearing was "incurred during service," and this can be shown by evidence that there has been a continuous disabling condition, even though slight, from the time of discharge. To tell a man that his disability must be "attributable to service as such" is virtually, in many cases, to cause him to cease any further efforts for a pension. He knows his disability began on service, but that it was caused by service he realizes is impossible to prove. Whereas if he knew that he would have an equally proper ground for pension if he could show a disabling condition "beginning on" (although not caused by) service, and continuing and developing down to the time of application, he would be prepared to produce this evidence.

It was suggested on the hearing that the ground given for refusing the pension was not important, but the Commission cannot agree with this view. An applicant is entitled to know the reason for the refusal of his pension, and it is misleading to tell him that he must show one particular state of facts without mentioning that another would equally establish his right. As must be evident, the application of the Pension Law of Canada is none too easily grasped, and when those who administer it state grounds of pension ability, it is considered they should be stated accurately and at least as fully as is necessary to ensure that the applicant will not be led into abandoning a claim which the facts apparent indicate he might have if he were told just what is necessary to establish his right.

It would be absolutely impossible to conjecture the number of cases which might have been adversely affected by these insufficient statements, and the obvious cure, as far as it now can be effected, is in administration rather than in legislation.

Recapitulation and Conclusions *Re* Section 11

(*a*) The 1919 Pension Act had reference essentially to those who had served in the war, and it included the few who remained in service after peace was declared, to clean up the debris of war. The Permanent Force was not included.

(*b*) The 1919 Act provided that pensions were payable on the "Insurance Principle," that is, for any disability incurred during service, although not "due to service", but it was intended, by the second proviso to Section 11, that when peace was declared, Canada would go back to the "due to service" principle.

(*c*) The G.W.V.A. claims that this change was not to affect discharged C.E.F. men, as to disabilities or deaths connected with their period of service, while the Pensions Board contends that it was to apply to all deaths or disabilities occurring after peace was declared, whether of discharged C.E.F. men or those still serving.

(*d*) The Commission found that, in its opinion, the change was only to apply to those who continued in the service for peace time duty, and was not to affect discharged C.E.F. men as to disabilities or deaths connected with their period of service.

(*e*) Col. Belton, the Chief Medical Adviser of the Pensions Board, considered that the change was not to affect discharged C.E.F. men or their dependents. Judge Margeson, one of the Commissioners, had exactly the opposite idea, and Mr. Archibald, the legal adviser, states his impression to be that the C.E.F. man himself was to be affected, but not his dependents.

(*f*) The representatives of the returned men thought that the change was not to affect discharged C.E.F. men or their dependents.

(*g*) The above was the confused situation when the 1920 amendments were proposed.

(*h*) By the 1920 amendments the Pensions Board proposed to bring in under the Act, for the first time, the Permanent Force.

(*i*) It wanted it understood that the "due to service" principle would apply to these men who were serving under peace time conditions.

(*j*) It therefore proposed to re-write Section 11 of the 1919 Act with its combined "Insurance Principle" and "due to service" principle, and substitute the "due to service" principle entirely.

(*k*) The representatives of the returned men asked, before the 1920 Parliamentary Committee and elsewhere, whether the C.E.F. men or their dependents were effected by these amendments, and were told by representatives of the Pensions Board that they were not. They also undertook that if any further provision were necessary to safeguard the rights of these men and their dependents, it would be put in. The representatives of the G.W.V.A. accepted these assurances and the amendments were passed.

(*l*) The representative of the Pensions Board who gave these assurances was under the impression that discharged men were already cut out by the second proviso to Section 11 of the 1919 Act. This impression was in the opinion of the Commission, erroneous.

(*m*) In view of the Commission's conclusion as to the true construction and intention of the 1919 Act, it can be said now that these assurances were not carried out because the Saving Clause Section 29, construed literally, did not protect the rights which discharged C.E.F. men and their dependents had acquired under Section 11 of the 1919 Act, but only saved disabilities or deaths occurring before September 1, 1920, as to everybody, C.E.F. or otherwise. After that date the new Section 11 came into effect as to discharged C.E.F. men and their dependents, as well as to all others, and this meant that

after that date, if the Statute were interpreted strictly, two classes of cases which formerly had been dealt with on the "Insurance Principle" would be refused pension unless they could show that the death or disability was caused by Military Service.

(*n*) These classes would be:

(1) The dependents of those who died after September 1st, 1920, even though the death was due to something which was incurred on service, and even though the deceased had been receiving pension for the very trouble which caused the death (unless the pension was 80 per cent or more);

(2) The discharged C.E.F. man who had a disability which could be shown to be connected with his period of service, but who could not show that his condition at discharge was serious enough to constitute a disability, *i.e.*, the "missing link cases."

(*o*) Although this strict construction was apparently contemplated by Judge Margeson, who was under the impression that it was already the law under the 1919 Act, the Commission considered it extremely doubtful whether the Pensions Board as a whole, or its staff, expected that the amendments would have to be construed so as to cut off these dependents. The "missing link cases" had neither come up nor been anticipated at that time, so far as the evidence shows.

(*p*) The Pensions Board answered fully and frankly the written questions of the G.W.V.A., as to various phases of the 1920 amendments, but no question was asked directly as to dependents' cases.

(*q*) There was in the answers quite sufficient, in the opinion of the Commission, to warn those interested that deaths after September 1st, 1920, would be treated on a different basis, but the assurances previously given that discharged C.E.F. men would not be affected, and the possibility of treating death as a culmination of a pensionable disability, and therefore pensionable, evidently was regarded as quite sufficient to ensure that there would be no adverse action.

(*r*) The Statute had another adverse effect, which was not foreseen—On account of a bona fide mistake in the official date of the Declaration of Peace, it brought the "due to service" principle into force a year sooner than it would otherwise have been.

(*s*) Instructions were issued to the Provincial Units based on the new section, but the Unit Medical Directors did not regard these instructions as altering the Act, and made no change in recommending pensions.

(*t*) The Pensions Board, however, dealt with the dependents' cases, as they came up, on the new principle, and simply took the Act according to what they considered to be its legal interpretation, without paying any attention to the assurances of those concerned in explaining and passing the Act, and without taking any steps to bring to the attention of the Government or of Parliament the apparent hardship which was being done to dependents. It is probable that up to this time comparatively few cases had arisen where it could be said that the death was not "due to service", and that a liberal allowance was made in construing the word "service", as not only implying military duty, but any condition during service which might have a remote bearing on the disability.

(*u*) In 1921 the Statute was made more stringent by requiring it to be shown that the disability or death was caused by military service "as such" —but again before the Parliamentary Committee the assurance was given in the presence of representatives of the Pensions Board, and without any dissent from them, that the amendment only affected the "present military service".

(*v*) Shortly before this amendment was passed the Pensions Board Staff in the Provinces was absorbed by the D.S.C.R., and Dr. Arnold who as Director

of Medical Services was head of the Medical Staff of the D.S.C.R., was made Chief Medical Adviser to the Pensions Board as well, and thus assumed control of the Pensions Board Medical Staff at Headquarters.

(*w*) On June 25th, 1921, shortly after the "as such" amendment was passed, instructions were issued over Dr. Arnold's signature as Director of Medical Services, reciting that there had apparently in the past been some doubt as to the interpretation of Section 11 of the Pension Act and its amendment, and laying down definitely that the "Insurance Principle" was abrogated as to deaths or disabilities accruing after January 10th, 1920, which was the supposed date of the Declaration of Peace. This instruction made no distinction between discharged C.E.F. men and the Permanent Force, and it put the adoption of the "due to service" principle back about eight months, to January 10th, 1920, instead of September 1st, 1920, and the date fixed in the 1920 amendments. This was a declaration that the second proviso to Section 11 of the 1919 Act was considered applicable to discharged C.E.F. men, although the evidence given before the Commission was to the effect that, except in one instance, this second proviso had never been put in force.

(*x*) It is evident that the new administration was trying to have laid down more definite principles of administration and that the Pensions Board in compiling these was guided solely by the legal construction of the statute and took no account of the discussions which had taken place. These discussions, although they provided an informal and irregular means of ascertaining the intention of the statute, at the same time were not wholly to be disregarded, having in mind the liberal attitude with which it was apparent Parliament had viewed legislation on this subject, and in view of the anomalies which had developed.

(*y*) On July 20, 1921, an annotation was issued, compiled by the Pensions Board, which pointed out that the amendment of 1921 emphasized the fact that deaths or disabilities, to be pensionable, must be directly attributable to service, and which made no distinction between discharged C.E.F. men and others.

(*z*) There is no evidence that the G.W.V.A. knew that the "due to service" principle was being applied to discharged C.E.F. men until the change of policy effected by the interpretation of the amendments began to be realized by them during the latter part of 1921, and the commencement of 1922, from letters which they were receiving in which discharged C.E.F. men and their dependents were required to show that the disability was "attributable to military service as such."

(*aa*) In October, 1921, it was discovered that the official date of the Declaration of Peace was August 31, 1921, instead of January 10, 1920, and a minute was issued by the Pensions Board to the D.S.C.R., revising the minute of June 25, 1921, and changing the date for the abrogating of the "Insurance Principle" from January 10, 1920, to August 31, 1920. The latter date was the date when the 1920 amendments had come into force, but it was a year earlier than the official Declaration of Peace. Obviously, if the 1920 amendments had not been passed, the date fixed in this minute would have been August 31, 1921, instead of August 31, 1920.

(*bb*) The 1920 amendments had fixed September 1, 1920, as the date of the discontinuance of the "Insurance Principle", on the assumption that the Declaration of Peace had taken place on January 10, 1920. Although it was found that the assumption was an error, and that the official date of the Declaration of Peace was August 31, 1921, there is no evidence of any steps being taken to bring to the attention of the Government, or of Parliament, the cases of pension which had been refused but which would have been granted if the 1920 Act had not anticipated the date of the Declaration of Peace by one year.

(*cc*) In the only case in evidence where the "due to service" principle was enforced against dependents after January 10, 1920, and prior to September 1, 1920, the evidence is that the Pensions Board did not, of its own motion, correct the error after the true date of the Declaration of Peace was ascertained, but it was only after a delay of nine months, and after repeated letters by those interested that the pension was granted.

(*dd*) A substantial number of dependents' claims have been refused which would have been granted if the "Insurance Principle" had not been discontinued, and these cases will continue to occur in future as deaths take place.

(*cc*) It is admitted that some "missing link cases" of discharged C.E.F. men have also come up and been refused on account of the discontinuance of the "Insurance Principle," and these cases will continue to occur.

(*ff*) It is morally certain that cases have been prejudiced by the lack of care in fully stating the grounds on which decisions respecting pensions have been based, from which the applicant has assumed that the door is shut if certain conditions are not complied with, when as a matter of law and practice there were other circumstances, which if shown, would constitute an equally sound right to pension.

(*gg*) *In consideration of the foregoing, the Commission* is of the opinion that provision should be made:—

(*a*) for payment of Pensions to dependents of discharged C.E.F. men in case of death occurring since September 1st, 1920, but due to disabilities incurred during service. This class will automatically include dependent cases which have been deprived of Pension because of the error in the date of the Declaration of Peace; and it is not to be overlooked that if death was due to a non-continuous war time disability and if the opinion below as to "missing link cases" is accepted, then the dependents in "missing link cases" should be pensionable as well and provision should be made accordingly.

(*b*) For payment of pension in any genuine "missing link cases" which have been refused (provided they are not barred by Section 13), and that a definite policy be laid down for the future in respect of these cases based on a time limit (in medical opinion) within which it can be reasonably said that all disabilities connected with the service period must have shown themselves. It would appear that Section 13 of the Act which limits the time for application for pension was passed for this purpose.

PART THREE

RE SECTION 25 (3) OF THE PENSION ACT

The claim made by the G.W.V.A. in particularizing the statements made in the telegram is:

> That the regulations based on Section 25 (3) of the Pension Act have been so amended by the Board as to nullify the intention of this Section, and thus cause the cancellation of many awards previously made, and the rejection of legitimate claims now under consideration.

Sections 25 (3) deals with the questions as to how a man's right to pension is affected by the circumstances that he had a disability when he enlisted.

Section 25 (3) as finally amended is as follows:

> No deduction shall be made from the pension of any member of the forces who has served in a theatre of actual war on account of any disability or disabling condition which existed in him previous to the time at which he became a member of the forces; provided that no pension shall be paid for a disability or disabling condition which at such time was wilfully concealed, was obvious, was not of a nature to cause rejection from service, or was a congenital defect.

Take for instance a man who was accepted for service and passed A1. He served in France, or elsewhere was injured by the enemy. On discharge he was found to have a disability. The Board which examined him on discharge was convinced that he had either in whole or in part the same disability on enlistment although he had been passed A1. The very difficult question arose as to what proportion of his discharge disability was incurred or aggravated during service and what proportion existed on enlistment. The claim was made that the man having been accepted as A1, and having been called on to perform, and having performed, the duties and taken the risks of an A1 man and now being discharged disabled, the country was estopped from claiming that, although he was A1 on enlistment for the purpose of service, he was not then A1 for the purpose of pension.

A summary of some of the further reasons advanced in favour of disregarding the pre-enlistment disability is given in Mr. MacNeil's evidence as follows (Record p. 124):—

> 1. Medical examination upon enlistment was faulty.
>
> 2. The regulations governing medical examination upon enlistment and subsequently were relaxed during certain periods because of the crying demand for reinforcements.
>
> 3. No accurate evidence could be obtained with regard to pre-enlistment conditions.
>
> 4. It was not possible to gauge with any accuracy the degree of aggravation or natural progression upon service.
>
> 5. The documentation under service conditions and upon discharge was frequently inadequate.
>
> 6. Endurance of the hardships, fatigue and strain on the field in common justice compelled the general conclusion that subsequent physical incapacity must be recognized as due to service.

The general principle was accepted and during 1918, before the Pension Act was enacted, two successive regulations were made which will be quoted hereafter, and an Order in Council (P.C. 3070) dated December 21st, 1918, was passed in practically the terms of Section 25 (3) above set out, with this difference, that not exception was made where the disabling conditions was "of a nature to cause rejection from service" or "was a congenital defect." Then in 1919, when the provision was incorporated in the Pension Act, an exception was added to provide for the case where the disabling condition was "not of a nature to cause rejection from service" and in 1921 the further exception was inserted to cover the case of a "congenital defect."

Divergent Views as to the Meaning of Section 25 (3)

The G.W.V.A. took this section to mean that a man accepted as A1, who served in France, was pensionable for any disability which he had when he was discharged, regardless of the fact that the whole or part of his disability existed when he enlisted; the only exception to this rule being that if the man had wilfully concealed a disability, when he enlisted, or if a disability was so obvious that it could not be assumed that it had been overlooked, or where a disability had existed from birth, then this section did not apply, and in those exceptional cases the only thing the country would be liable for would be any increase in the disability which had occurred during the period of service. In other words the G.W.V.A. considered it to mean that a man who served in France must have been fit on enlistment.

The Pensions Board placed two limitations on the construction. It says:—

(1) That section 25 (3) does not apply at all unless the soldier is pensionable under section 11 on account of some aggravation or increase of his pre-enlistment disability during service;

(2) That the effect of the section is that as soon as the disability is reduced by a percentage equal to the aggravation or increase during service, the whole pension must be discontinued.

The G.W.V.A.'s claim is:—

(*a*) That the section itself imposes no such limitations;

(*b*) That the interpretation first given the section by the Pensions Board did not make this limitation nor was it not carried out in practice;

(*c*) That regulations subsequently made changed the interpretation and practice.

The dispute as to section 25 (3) probably precipitated the telegram which is the subject of this investigation. A minute passed by the Pensions Board, dated September 29, 1921, (Ex. H.D.D. 18A) containing the ruling above stated, came to the attention of the G.W.V.A. in May, 1922, and aroused the apprehension that the benefits of the statute were being reduced by administrative regulations.

The three contentions of the G.W.V.A. have to be considered separately as to the two rulings complained of:—

1. No Rights Under Section 25 (3) Unless the Soldier is Pensionable Under Section 11

(a) Was this the intention of the section?

The intention is to be determined ordinarily by what it says. The G.W.V.A. questions the interpretation of the Pensions Board as a matter of law. The G.W.V.A. also, as in the case of section 11 (Part Two), refers to the history

of the enactment as showing that it was understood and intended in effect by those who had to do with the passing of this section, that it in itself created a right to pension. As to the legal effect of the section as worded, the Pensions Board obtained an opinion from the Department of Justice on June 15, 1922 (the day on which the telegram under investigation was published). The Pensions Board's letter with the answer of the Department of Justice follows:—

B.P.C. 17-7-1 Vol. 5,
June 15, 1922.

Deputy Minister,
Department of Justice,
Ottawa, Ont., Canada.

DEAR SIR,—The Board of Pensions Commissioners has, through the efforts of the Great War Veterans Association been charged with "concealment" and issuing of "secret regulations," with a view to depriving the returned soldiers of their rights. In support of this the G.W.V.A. quotes a memorandum of the Board dated September 29, 1921, a copy of which is attached hereto.

The point submitted for your consideration is the interpretation of section 11 of the Pension Act, chapter 43 of the Statutes of 1919 in conjunction with section 25 (3) chapter 43, 1919, as amended by chapter 62 of the statutes of 1920.

The Board considers section 11 the most important section of the Act because of the fact that it lays down the conditions precedent to an award of pension, further it involves one of the basic principles of pension law.

The Board's interpretation is that entitlement must first be established under section 11 before the benefits of section 25 (3) can apply. In practice this is generously carried out, by way of illustration,—

(*a*) A man accepted as fit gets to France and there develops a disease which medical knowledge knows was present prior to enlistment and which condition had not been aggravated on service, is pensionable for the full amount of his disability on discharge.

(*b*) A man with a pre-existing disability which he gives particulars of on attestation, E.G., blind in one eye—is discharged without further disability, no pension is awarded.

It is submitted by the G.W.V.A. that section 25 (3) was introduced into the Act with the intention that if a soldier reached an actual theatre of war categorized as A1 he would thenceforth, for the purposes of pension be considered as physically fit.

Your opinion is desired on the following points.

1. Is entitlement under section 11 first to be established before section 25 (3) can be applied?

2. When the aggravation by service of a pre-existing disability has ceased, is pension indicated for that portion of the disability which pre-existed enlistment?

3. To what extent, if any, are the following examples entitled to pension:—

(*a*) Enlisted with an ear condition not apparent at the time but which was subsequently discovered on service and progressed normally, reached France, was discharged January, 1920, estimated disability of 15 per cent, none of which was due to service.

(*b*) Enlisted with an ear condition not apparent at the time but which was subsequently discovered on service, reached France and was discharged January, 1920, estimated disability 15 per cent, 10 per cent of which was due to pre-existing disability and 5 per cent to aggravation?

(*c*) Enlisted with an ear condition estimated at 10 per cent disability, served in France, and was discharged without any disturbance of the condition or increase of the disability present on enlistment?

Yours truly,
(Signed) J. PATON,
Secretary.

OTTAWA, 15th June, 1922.

DEAR SIR,—I have considered the questions submitted by your letter of this date, and I would answer as follows:—

Question 1.—Is entitlement under section 11 first to be established before section 25 (3) can be applied?

Answer.—Section 11 prescribes the conditions of eligibility for pension, and there can be no grant except to a member of the forces whose case complies with those conditions. Section 25 (3) has no application except with regard to a member of the forces whose right to pension is otherwise established.

Question 2.—When the aggravation by service of a pre-existing disability has ceased, is pension indicated for that portion of the disability which pre-existed enlistment?

Answer.—I am not aware of any provision, and you do not refer to any, which authorizes payment of pension in respect of a disability, whether by reason of aggravation or otherwise which has ceased.

Question 3.—To what extent, if any, are the following examples entitled to pension:—

(*a*) Enlisted with an ear condition not apparent at the time, but which was subsequently discovered on service and progressed normally, reached France, was discharged January, 1920, with estimated disability of 15 per cent, none of which was due to service?

Answer.—Not entitled.

(*b*) Enlisted with an ear condition not apparent at the time but which was subsequently discovered on service, reached France and was discharged January, 1920, estimated disability 15 per cent, 10 per cent of which was due to pre-existing disability and 5 per cent to aggravation?

Answer.—Entitled to pension on the footing of 15 per cent disability.

(*c*) Enlisted with an ear condition estimated at 10 per cent disability, reached France and was discharged without any disturbance of the condition or increase of the disability present on enlistment?

Answer.—Not entitled.

You will perceive from these answers that in my view the practice of the Board in the cases described in illustration (*a*) may have been more favourable to the applicants than the strict interpretation of the law would justify.

(Sgd.) E. L. NEWCOMBE,
Deputy Minster of Justice.

NOTE.—In quoting the above letter the answers to the various examples under Question 3 have been placed under their respective paragraphs and not as in the original, where they were all placed together.

This opinion can properly be relied on by the Pensions Board as confirmation of its ruling that pensionability under section 11 must be shown before section 25 (3) comes into operation. Example (c) and the answer indicates that the presence of a disability at discharge is not enough to establish pensionability under section 11, if it can be shown that the disability existed to as great an extent on enlistment. It is assumed (although it does not clearly appear) that in answering Example (c) the Department of Justice was not treating the pre-enlistment disability as "obvious."

The G.W.V.A. questions the correctness in law of these conclusions on the ground that they work out a manifest anomaly. They instance two men, A and B, discharged from equal services in France, A has a 25 per cent disability on discharge, and B has a 30 per cent disability on discharge. The Pensions Board is able to show that both men had a 25 per cent disability on enlistment. A gets nothing for his 25 per cent disability and B gets the full 30 per cent for his disability on account of being fortunate enough to have a 5 per cent increase in disability by aggravation during service.

The G.W.V.A. says the anomaly would entirely disappear if the section were construed to give effect to the overshadowing idea that a man who got to France was to be assumed to have been fit on enlistment.

Even if a formal and express ruling by the Pensions Board on a matter of law could be questioned when made in the abstract and not in an actual case, the recognized authority of the Deputy Minister of Justice would lead the Commission to consider that the ruling of the Pensions Board, as to the strict legal construction requiring that entitlement of pension under Section 11 be shown before Section 25 (3) is applied, is to be accepted for the purpose of the investigation.

It must be remembered, however, that the Pensions Board is its own interpreter of the statute. The Pensions Board had already, in an annotation issued in 1919 (Exhibit H.D.D. 49), interpreted the statute to mean that a man who served in France was entitled to pension for his full disability on discharge, regardless of any pre-enlistment disability. In view of this and of the history of the section which will be hereafter referred to, the Pensions Board might have been quite justified in adhering to its original interpretation if reasonable ground for that interpretation could be found in the statute. Some considerations which might justify the first interpretation given the section by the Pensions Board follow. The reason apparently for saying that in order to get the benefit of Sec. 25 (3) a man must be entitled to pension under Sec. 11, is the phrase used in Sec. 25 (3):—"No deduction shall be made from the pension," etc. It may be that too much importance is given to this word "pension" as used in the section. The earlier system had been to deduct, from the total percentage of disability on discharge, the percentage of disability on enlistment. The claim was that this should not be done in the case of a man who reached France because it should be presumed that if he was able to carry on there he must have been fit when he enlisted. It was therefore desired to stop this system of deducting. The words used in Section 25 (3) were "no deduction shall be made from the 'pension.'" but "pension" could only refer to the gross percentage of discharge disability from which it had formerly been the practice to make a deduction. The fact that the pre-enlistment disability is to be deducted from the "pension" necessarily indicates that the "pension" which is spoken of must be an award which includes the pre-enlistment disability. The result therefore seem to be either that under Section 11 a man has a prima facie

pension for whatever disability he had on discharge, or that Section 25 (3), by implication, creates, at one and the same time, a right to pension for the gross amount of the disability on discharge and then prevents any deduction from this gross amount. The fact that the amount to be deducted (i.e., the pre-enlistment disability) happens to be as much or more than the gross disability would seem to be immaterial. The statute prohibits the deduction whatever it may be. The effect is that no account is to be taken of the pre-enlistment disability.

History of Section 25 (3)

Up to some time in 1918 the practice was to take the estimated percentage of a man's disability on discharge and deduct from that the percentage of disability which it was considered he had on enlistment and to pension him for the difference. (See Col. Belton's evidence before the Parliamentary Committee in 1918, vol. LIV Sessional Papers of the House of Commons, Vol. 2 p. 333 and Record p. 127.)

On February 12, 1918, the following ruling was made by the Pensions Board (Record p. 1419):—

> In the opinion of the Board of Pension Commissioners, Canadian Pension Regulations intend benefit of every doubt to be given pension applicants, *especially if dependents are concerned*. Therefore, most disabilities, or death, becoming apparent *during* service are fully pensionable (fraud, gross errors on enlistment, and improper conduct excepted).
>
> Cases of aggravation of conditions pre-existing enlistment (and of disabilities from improper conduct) will be considered individually. If applicant was apparently healthy at (and for some time before) enlistment and during more than three months of service deductions for pre-existence of disability will be insignificant. This instruction to rule pending new legislation by next Parliament.

On April 2, 1918, the following regulation was made (Record page 1419-:

> It was resolved that disability or death, found to have been due to the aggravation of a condition which pre-existed enlistment, is pensionable as if wholly due to service when:
>
> (*a*) the pre-existing condition was neither apparent nor wilfully concealed at enlistment, and did not become apparent for a reasonable time thereafter; or
>
> (*b*) the pre-existing condition, though apparent at enlistment, was considered to be negligible.

Representations were made by the G.W.V.A. to the 1918 Parliamentary Committee (Record, p. 130-131) to the effect that "disability previous to enlistment or aggravation previous to enlistment shall not be considered in granting of a pension."

On May 10, 1918, Mr. Archibald, the legal advisor, wrote on behalf of the Pensions Board to the Hon. Mr. Rowell, the Chairman of the 1918 Parliamentary Committee, quoting the above suggestion of the G.W.V.A. and stating that it had already been considered by the Pension Board and approved with modifications, and quoting the following amendment of the Pension Regulations which had already been submitted by the Pensions Board to the Parliamentary Committee for consideration:—

> *That pensions be payable* whenever a disability becomes apparent more than three months after enlistment or enrolment of a member of the forces, provided that no pension be awarded for that portion of a

> disability which existed at the time of enlistment or enrolment and was wilfully concealed, or was apparent or became apparent before the expiration of three months from the date of enlistment or enrolment.

This meant that a pension was payable for any disability which appeared not less than three months after enlistment, whether it had existed on enlistment or not, and no matter where the soldier was serving, the only exception being where the disability was wilfully concealed or was apparent on enlistment or had appeared within three months after enlistment.

Major Todd, one of the members of the Pensions Board at that time (1918), gave evidence before the 1918 Committee (1918 Parliamentary Committee Proceedings p. 279 and Record p. 1321). He said, referring to the above suggested amendment:—

> That is what is at the bottom of our recommendation that Mr. Archibald has put before you—that after a man has been in service for three months we should consider *that the man is whole and pension him for everything*. That is one of the most difficult points with which we deal, and our instructions are not sufficient.
>
> Q. That is, should you do away with *deduction for previous disability*?—A. Yes, that is it, put in very brief language. We want a definite instruction on that point. The lack of definite instruction makes our position exceedingly difficult.

On May 20th, 1918 the Special Parliamentary Committee recommended as follows (1918 Parliamentary Committee Report, p. XI):

> That no deduction should be made from the pension of any member who has served in a theatre of actual war, other than the United Kingdom, on account of any disability or disabling condition existing prior to enlistment, provided that the pre-enlistment disability or disabling condition had not been wilfully concealed by the said member, or was not obviously apparent in said member at the time of enlistment.

As will be seen this man was different in two respects from that which had been suggested by the Pension Board:

(*a*) It commenced with the words "no deduction shall be made from the pension" whereas the form of the recommendation had been "that pensions be payable."

(*b*) It limited the benefits of the Section to those who served in the theatre of actual war instead of extending it to everyone who enlisted.

This recommendation was drafted apparently by Mr. Archibald, the legal adviser of the Pensions Board, in collaboration with Mr. Nickle. Mr. Archibald says (Record p. 1191):

> At the time I cannot tell you what the Parliamentary Committee meant by it or what I meant by it except that I said to myself:—a soldier got to the front and he is supposed to be A1. He must be alright unless it is obvious—and some of these little kinks that I put in it. I haven't thought about that subject at all for certainly going on two years; but I remember that I put in my annotations to the Pension Act, precisely that:—*that whatever a man had when he got home was pensionable, unless it was obvious in the earlier stages. I am not so sure that that was not what they all meant.*

It is the insertion of the words "no deduction shall be made from the pension" which has created the difficulty and it is urged that it must be taken as meaning what Major Todd had contemplated when he says, as quoted above, that a man who has been in the service three months should be considered "whole" and pensioned for everything.

A very likely explanation of the use of the word "deduction," appears from the discussions in Committee. It was the deduction of the pre-enlistment "disability" from the discharge "disability" which was apparently in mind. This somehow got transformed into deduction of the pre-enlistment disability from the "pension," and hence arose the alleged necessity for showing that a man was entitled to a "pension"—not simply that he had a discharge disability—before 25 (3) applied.

The idea of deduction of a disability from a disability is shown in the citations below. Col. Belton, speaking of the practice before the principle of section 25 (3) was adopted, said (1918 Parliamentary Committee p. 86, Record p. 125):—

> it is the policy and the procedure to take that to mean that the pensionable part of a man's condition or his aggravated condition, is the degree of aggravation only: that is to say that that particular disability that was present on enlistment is deducted from the whole disability and only that which occurred on service is pensionable."

And again: (Record p. 129) and Mr. Pardee, M.P. (Record p. 132).

And also (Proceedings 1922 Parl. Com. p. 412) where Col. Arthurs, M.P., speaks of his understanding that no pre-existing condition should be "counted against the disability."

On July 2, 1918, the above regulations of February 12, 1918, and April 2, 1918, were superseded by a new regulation (Record page 569) made by resolution of the Pensions Board, the relevant portion of which was as follows,—

> It was resolved that no deduction shall be made from the pension of any member of the forces on account of disability pre-existing enlistment when such member of the forces has served in a theatre of actual war.

Then follows an exhaustive definition of "Theatre of War"; and the regulation concludes as follows:

> It is to be understood that disabilities which were wilfully concealed on enlistment or which were obviously apparent at that time will not be pensionable.
>
> The resolution as above is in accordance with a recommendation of the Parliamentary Committee on Pensions, which was appointed by the House of Commons at its last Session.

Later in the same year Order in Council 3070 was drafted dated December 21, 1918. It was practically to the same effect as the regulation of July 2, 1918. This Order in Council was as follows:

> 7A. *No deduction shall be made from the pension* of any member of the forces who has served in a theatre of actual war other than the United Kingdom on account of any disability or disabling condition existing prior to enlistment provided that the pre-enlistment disability or disabling condition had not been wilfully concealed by the said member of the forces or was not obviously apparent in the said member of the forces at the time of enlistment. The words "theatre of actual war" as

> used in this Section and in Section 7B shall mean any country in which Canadian Naval or Military forces are in contact with the enemy on land, or in the case of naval forces, any navigable water.

In 1919 the Order in Council was incorporated practically verbatim in Section 25 (3) of the Pension Act.

Hon. Mr. Rowell, the Chairman of the Parliamentary Committee, on June 29, 1919, explaining in the House of Commons the effect of the existing regulations (P.C. 3070 quoted above) and the effect of sec. 25 (3), made it clear that there were no limitations on the right of a man who got to France to pension for whatever he had on discharge (Hansard p. 4174 and 4176 and Record p. 3416):

> If a man reached France, then he gets a pension regardless of any pre-existing disability. That is the law as it stands in the Pension Regulations.

(Record p. 3417):

> There was this distinction before the Committee. A man is not entitled to a pension with respect to a pre-existing disability. In other words, the State compensates him for a disability sustained or aggravated during service. The State is not under obligation to compensate him for a disability which existed prior to enlistment. But the Committee thought in the Army Medical Corps passed a man through and he actually got to the Front, we should ignore any question of pre-existing disability and grant him a pension.

The section continued in the Act under practically the same form down to the present time.

There is no evidence whatever that the interpretation of the section (requiring pensionability under Section 11 before Section 25 (3) became operative) was in the minds of those who had to do with the enactment, and at least it was apparently not contemplated by the draftsman, the Chairman of the Parliamentary Committee, or the G.W.V.A. representatives. There is no evidence, however, of any undertaking or representation on the part of the Pensions Board at the time the regulations of July 2, 1918, and the Order in Council (P.C. 3070) were put in this form in 1918, or at the time the statute was passed in 1919, that the Act would be administered otherwise than according to its strict legal construction.

(b) Did the interpretation first given to Section 25 (3) by the Pensions Board require pensionability under Section 11 and what was the original practice in this respect:

At the time the 1919 Act was passed, annotations (Ex H.D.D. 49) prepared by Mr. Archibald, legal adviser of the Board, were circulated generally. The annotation under Section 11 was:

> Those who got to France are pensionable for any *disability which exists in them at the time of discharge* unless the disability was obvious or concealed on enlistment.

and the annotation under Section 25 (3) was:—

> For more than two years efforts have been made from various quarters to have pensions awarded in accordance with the disability existing in the man at discharge, *whether the whole* or a proportion of that disability existed in him at the time of enlitsment or not. In the earlier years of the war, owing mainly to the need, men were enlisted who while

> fit for service for which they were intended were not absolutely fit from the point of view of occupation in the general labour market. Many were also enlisted who were not even fit for the less arduous of the duties of military life. Many of these unfits were discharged before leaving Canada; many more were discharged in England; only the most fit were taken to France. Again many men who were recognizedly unfit for service in the front line were enlisted in forestry, railway construction and other similar battalions. The Parliamentary Committee of 1918 came to the conclusion that if any man reached a theatre of actual war it must be *definitely presumed that he was absolutely fit upon enlistment unless* it could be proved that there was a pre-enlistment disability which was concealed or was obvious, or was of so minor a nature as not to cause rejection from service.

Nothing could be clearer than this. Mr. Archibald evidently took the construction that any layman would take and treated it as granting pension for disability on discharge if the man went to France and if his disability was not obvious on enlistment and had not been wilfully concealed.

But then the question arises as to whether this interpretation was actually applied in practice up to September, 1921. If a man who reached France was definitely assumed to have been absolutely fit on enlistment (as the annotation said), then a man who reached France was pensionable for whatever disability he had on discharge, and no inquiry would be made as to whether he had in fact had the same disability on enlistment. This would pension the man whose pre-enlistment disability had not been aggravated, but the question is whether it was applied in a case like that. The evidence is very conflicting and difficult to follow.

Mr. Ahern, the former secretary of the Pensions Board, stated (Record p. 888) that his recollection as to the practice of the Board was that pensionability under Section 11 had to be shown.

Most of the Unit Medical Directors had the idea that pensionability under Section 11 was required; one of the Unit Medical Directors had the theory that aggravation or increase of disability on service was presumed in cases of pre-enlistment disability where men had reached France. (Record p. 485, 486 and 488). The evidence of the Unit Medical Directors is found on the following pages of the Record:—

Dr. Lundon, Montreal (Record p. 698).
Dr. Hewitt, Toronto (Record p. 762).
Dr. Ellis, Halifax (Record p. 910).
Dr. McIvor, Winnipeg (Record p. 538).
Dr. Johnson, Calgary (Record p. 600).
Dr. Wickware, Regina (Record p. 931).

Col. Thompson stated before the Parliamentary Committee (1922 Parliamentary Committee proceedings p. 347 Record p. 1290) that the Minute of September 29, 1921, which required pensionability under Section 11 before Section 25 (3) applied, was only a crystallization of the previous practice.

The purport of Judge Margeson's evidence is that, as a proposition of law, he agrees with the construction of Section 25 (3) which requires that there be first pensionability under Section 11 (Record p. 1041) and he intimates that technically entitlement to pension under Section 11 had to be shown before Section 25 (3) applied (Record p. 1036, 1039, 1041); but he adds he could "hardly conceive" of a case where pension would not be paid if a man got to

France and had a disability on discharge (Record p. 1040, 1041). He uses such expressions as:—

> I cannot at present think of any I would ever turn down. (Record p. 1038).
>
> I do not know of any cases bowled out if they got to France. (Record p. 1041).
>
> It would have to be tremendously apparent that service could not possibly have done anything to affect him so as to give him a pensionable right. (Record p. 1037).

He further indicates that, in practice, the Pensions Board assumed that a man who had served in France and had a disability on discharge was pensionable under Section 11 and, therefore, would get the benefits of Section 25 (3). (Record p. 1036):—

> Q. Do I understand you to say that aggravation or pensionability would be assumed?—A. I think that when Parliament put that in, that was practically what they thought. *He would get a pensionable right under Section 11 (a) from the mere fact that he was in France.*
>
> Q. Do you say that was the practice of the Board when you were a member of it?—A. That is right. I do not say that they all got it but I say that that is what we tried to do.

and again (Record p. 1266—quoting from Parliamentary Committee proceedings, p. 328):—

> It is my idea that if a man actually got to France whether he concealed anything or not he should get a pension—if he got to the theatre of war. Of course that is a matter for the Commission.

Dr. Burgess expressed the same idea before the 1920 Parliamentary Committee (Committee proceedings p. 120—Record p. 1263) as follows:—

> The fact that he has done that (i.e. gotten to France) is supposedly proof that such disability as he had before was negligible.

and further down the same page:—

> My personal view is that if a man got to France and served in the front line it is reasonable to assume that such disability as he may have had before was negligible.

But, although this is wide enough to cover all cases, it is not clear that Dr. Burgess had in mind the case of a man who had no actual increase of disability on service, because he uses the words "no deduction" in answers which he had given just before the above (Record p. 1262).

Col. Belton, formerly Chief Medical Advisor, states in effect that the practice was as has been set out in Mr. Archibald's memorandum (Record p. 1098).

Mr. Archibald, the legal adviser of the Pensions Board who was a Commissioner for a time up to January, 1921, never thought about a disability having to be increased on service to be pensionable if the man reached France. and the possibility of a connection between Section 11 and Section 25 (3) never occurred to him till he came to Ottawa to attend as a witness on this investigation (Sept. 5, 1922), when he was shown the opinion of the Department of Justice.

Mr. Archibald says (Record p. 1192):—

> Whatever a man had when he got home was pensionable unless it was obvious in the earlier stages. I am not so sure that this is not what they all meant.

He further says (Record p. 1193):—

> I will admit that when that Section was put in there I never thought about aggravation at all. It never entered my mind.
>
> Q. Or progression?—A. Or progression or any of these fancy things

I have heard talked about.

and (Record p. 1194:—

> Mr. ARCHIBALD: As a fact I never heard—I certainly cannot remember knowing anything about the connection between Section 11 and Section 25 (3) until I got to Ottawa the other day, when I was given a letter from the Justice Department. I never connected the two at all. I just took it that they could be applied separately.
>
> Q. You took it the way it is expressed in your annotations?—A. Yes, I did not know how the medical men were doing it. I supposed they were doing what I told them in my annotations.

He says further (Record p. 1223:—

> WITNESS: I used to say that I could make a section in the Act to cover everything, but—in fact I thought I had; I thought I had done just exactly what everybody wanted; but I see that there are two or three things here that are capable of only one meaning, not even ambiguous, and that meaning is not the meaning I intended the section to have.
>
> *By the Chairman:*
>
> Q. Are you referring to section 25?—A. Take that 25 (3), as I understood 25 (3). The Justice Department does not understand it the same way at all, and when I read over the Justice Department's letter I realize that 25 (3) probably is not well drafted.
>
> Q. Just because of the word "deduction"?—A. Partly because of the word "deduction". I would throw the section out and put in a definition, or put in a clause under 11.

As to the general policy Mr. MacNeil says (Record p. 1276) it was made quite clear that:—

> If a man reached France, unless the disability was wilfully concealed or it was obvious, the exceptions stated, he was considered A1, and no reference was made at any time—of this I am quite positive—no reference was made at any time to the more recent ruling that pensionability must first be established under Section 11. The first hint of any departure from this policy was given us shortly after the amalgamation of the D.S.C.R., that is, during mid-summer, 1921.

Mr. MacNeil says his knowledge of the practice was obtained in the course of dealing with specific cases (Record p. 1286-7) and from officials of the Pensions Board (Record p. 1286). He says (Record p. 1275) that in 1921 he was proposing that the exceptions to Section 25 (3) as to "obvious", "wilfully concealed" and "congenital" disabilities and those "not of a nature to cause rejection from service" should be deleted—and that the officials of the Pensions Board advised the G.W.V.A.

> that to press that point would perhaps open the subject to such a degree that we would be deprived of the great benefits already conferred under the Section.

A case in June, 1919, was referred to by the Pensions Board to show that the Board had, in practice, refused pension where there was no aggravation; but in this case the ground for refusal of pension was really the insignificance of the disability (Record p. 3686 and 3779). There was however an eye case (Record p. 1967) in which pension had been refused because there had been no aggravation. This was on February 10, 1919, just after the Order in Council (P.C. 3070) which was in terms similar to Section 25 (3) had come into force. The attention of the Commission was not called to any such cases from the coming into force of the Pensions Act in 1919 until just previous to the passing of the Minute of Sept. 29, 1921, viz., on Sept. 6, 1921, and Sept. 8, 1921, (Record p. 2250 and 2134), when there were two cases in which pension was refused because there had been no increase of disability on service, but these cases were too close to the Minute of Sept. 29, and to the discussions which we taking place about that time with a view to having a definite policy laid down to afford any criterion of what the policy had been from the time the Act was passed in 1919.

On the other hand two cases were cited by the G.W.V.A. (Record p. 1925, 2026 and Record 1916, 2052) which had come up for re-examination repeatedly after Section 25 (3) was passed and in which pension had been granted even though the pre-enlistment disability was as great as the discharge disability. The explanation of these cases by the Pensions Board suggested that the pension was granted and continued in ignorance of the fact that there was pre-enlistment disability, but the Assistant Medical Advisor who passed these awards was not called.

No general practice either one way or the other can be deduced from these few equivocal and isolated cases.

There is no evidence as to just when it was realized that Section 25 (3), when strictly read, was not as wide as the annotations had stated. The general evidence of both the Pensions Board and the G.W.V.A. as to the practice is naturally not as satisfactory as if actual and unequivocal decisions were cited It has been clearly shown on this inquiry that verbal statements as to general policy are easily calculated to give erroneous impressions unless accompanied by actual instances of their application.

In trying to determine what the practice really was prior to September, 1921, there are two things which stand out above the impressions of individuals as to general practice. One is that the official annotations prepared and circulated by the Pensions Board, at the time the Pension Act was passed, made no restrictions on the right of a man who served in France to have a pension for whatever disability he had on discharge unless it was something which he had had from birth, or which was obvious, or which he had wilfully concealed at the time of enlistment, and these annotations stated that "it must be definitely presumed that such a man was absolutely fit upon enlistment." The second circumstance is that as late as the time when Dr. Arnold took over as Chief Medical Adviser he apparently found no rule laid down contrary to these annotations. In fact, the very thing which led to the serious consideration of the real meaning of the section was that, some time in the summer of 1921, the Assistant Medical Advisers wanted to know whether a man whose disability had not progressed on service was entitled to pension under Section 25 (3), and they discussed the point with Dr. Arnold. Dr. Arnold said (1922 Committee Proceedings p. 358 and Record p. 1298):—

> It was on a hypothetical case such as that, that I held a discussion with the medical officers and they said they did not feel clear as to what the future would hold for a case of that kind. Is a man, when he gets

to France and comes back, in exactly the same condition, where there is no question on the part of anybody that service had anything whatsoever to do with that condition, a condition which did not progress on service and is, in the opinion of the man himself and in the opinion of everybody, exactly as it was when he went into the army—is that man pensionable? Under the interpretation furnished to me they told me: "No, we do not believe that the Act means that, where a man gets to France and there is no progression, nor shadow of doubt in the minds of any one that service had anything to do with his condition, he should be pensioned."

The effect of this mass of evidence is, in the opinion of the Commission, that the case of the man who got to France and whose disability on discharge was no greater than on enlistment, had not come into sufficient prominence to create anything which could be called a practice or policy. It is essential to a "practice" that there be some unanimity of opinion among those who administered the Act and this is negatived by the divergent views which have been quoted.

The witnesses on the one hand put it hypothetically and say if such a case could arise it would not be pensionable, because there was no progression; and on the other hand if the interpretation laid down in the annotations and as understood by Mr. Archibald and Col. Belton were followed, such a case would be pensionable. The occasion for a definite ruling did not come up because it was accepted that if a man had a pre-enlistment disability, it must in the nature of things have progressed on service, or the other view was taken that there was a conclusive presumption that a man who got to France after passing medical examination in Canada and England must be regarded, for pension purposes, as having been fit on enlistment. The question does not seem to have really arisen till the hypothetical case was put up to Dr. Arnold after he took over as Chief Medical Adviser in the summer of 1921.

The Commission's conclusion is that between September 1, 1919, when the Pension Act was passed, and September, 1921, the only authoritative interpretation of Section 25 (3) was what was contained in the Pensions Board's annotations issued at the time the Act was passed. According to this interpretation a man who reached France was definitely assumed to have been fit on enlistment. On account of the dearth of cases there was no accepted practice as to an applicant who had reached France but whose disability had not increased on service. The lack of unanimity among the witnesses makes it impossible to determine with any degree of certainty what practice would have been adopted if such cases had come up; but it is thought that, notwithstanding the interpretation in the annotations, pension would have been refused.

(c) Have subsequent regulations changed the Pensions Board's interpretation of Section 25 (3) or the practice under it?

Mr. MacNeil, in the passage already quoted (Record p. 1276), says that the first hint of any departure from the policy of pensioning a man who had reached France for anything he had on discharge was given shortly after the amalgamation of the D.S.C.R. and the Pensions Board, i.e., during midsummer, 1921.

In the summer of 1921, the organization of the Pensions Board was absorbed by the D.S.C.R. and, as has been said, this resulted in the control of the medical staffs, both of the D.S.C.R. and Pensions Board, coming under Dr. Arnold, either in his capacity of Director of Medical Services of the D.S.C.R. or Chief Medical Advisor of the Pensions Board.

Dr. Arnold stated before the 1922 Parliamentary Committee, in the passage already quoted (Record p. 1297 and 1298), that he was having hypothetical cases put to him, and instances as one of these cases, a man who had been to France and who, on discharge, had a slight arterio-sclerosis which then caused no disability but which would progress as time went on. The question was whether that man coming up ten years later suffering from a disease clearly caused by arterio-sclerosis would be pensionable. He discussed it with his medical officers and they were not clear on the point. The inquiry apparently changed from the hypothetical case of the arterio-sclerosis man to the simple question as to whether a man who went to France was pensionable for a condition which was exactly the same on discharge as on enlistment. Dr. Arnold says that it (meaning the Pensions Board) furnished him with an interpretation which stated that it "did not believe the Act meant" that a man who got to France, but whose condition had not progressed on service, was pensionable.

Dr. Arnold stated in his evidence before the Commission (Record p. 1338-1341 and 1366-1382), that on assuming his new duties as Chief Medical Advisor of the Pensions Board, he found that there was not unanimity of opinion as to whether pension would cease when aggravation had disappeared, and he considered that it was necessary to have an exact ruling as to the legal effect of Section 25 (3).

Following this discussion the Pensions Board passed a Minute on September 29, 1921, giving its interpretation of the Section. The Minute is as follows (Ex. H.D.D. 18A):—

September 29, 1921.

Deputy Minister, D.S.C.R.,
A/Secretary, B.P.C.,

Interpretation of the Provisions of the Pension Act as applied to cases of **Aggravation.**

For the information of your Department the following is a copy of a Minute passed by the Board under date of September 29:

The Board had under consideration the question of the pensionability of—

(1) Pre-enlistment disabilities aggravated by service, and

(2) Subsequent recurrences of a disability condition in which aggravation on service had ceased.

It was Resolved

A. That Section 25 (3) of the Pension Act does not apply in any case unless entitlement exists under Section 11 of the Act;

B. That in any case previously fully pensionable under Section 25 (3) and in which it is decided that aggravation on service has ceased, further pension cannot be awarded after the aggravation is deemed to have disappeared.

C. That no distinction can be made between disabilities resulting from injury or disease, and that decision as to whether aggravation had disappeared is purely a medical one, and must depend upon the circumstances of each individual case;

D. That subsequent recurrences or exacerbations of a disabling condition in which aggravation on service had ceased must be shown to be attributable to service before further pension can be awarded.

(Sgd.) J. PATON,
A/Secretary.

Clause A is the important provision. Its effect was simply to put in black and white that the strict construction of Section 25 (3) was that, before a man could get the benefit of the section, he had to be entitled to a pension under Section 11. This, as a statement of the strict legal effect of Section 25 (3) was as has been mentioned, afterwards confirmed by the Department of Justice.

Illustrations of the alternative constructions of the Act follow:—

1. Assuming the interpretation to have been as set out in the annotations (Ex. 49 H.D.D.), a man who had been enlisted A1 and served in France, discharged with a 20 per cent disability from heart trouble, would be pensionable for the 20 per cent even though it could be shown that he had the same extent of disability from the same trouble when he enlisted.

2. Under the interpretations as set out in the Minute, this man would not be pensionable because there was no increase of disability during service and therefore nothing which could be pensioned under Section 11 as having been incurred during service.

Clause A therefore effected a definite limitation on the interpretation which had been contained in the annotations of 1919.

This Minute was promulgated by being passed to the Medical Advisers at Head Office, but was not sent out to the Units. (Record p. 1362-3). There was no instruction accompanying it to indicate any intention of the Pensions Board to make findings of fact or act on presumptions which would avoid the strict legal effect of the Minute as passed. To escape its effect, all that would be necessary would be to presume that a man who passed for service in France was for pension purposes "fit" on enlistment, or to assume that there must have been some increase on service of his pre-enlistment disability.

Since the terms of this Minute were in sharp contrast with the annotations which had been issued by the Pensions Board two years before, the Commission considers that some notice and explanation should have been given that the strict interpretation of the Act had made this ruling necessary.

Among the cases brought forward by the G.W.V.A. in support of the claim that the Minute of Septemebr 29 had changed the practice, were the two cases (1925 and 2028, 1916 and 2012) already referred to in which pension had been granted and continued for some years, but had been discontinued in the early part of 1922, on the ground that the disability had pre-existed enlistment and that there had been no progression. The reply made on behalf of the Pensions Board in these cases suggested that the pension had originally been granted in ignorance of the fact that the disability was a pre-enlistment one and although, as has already been stated been stated, this could not be conclusively shown without having the evidence of the Assistant Medical Advisers who made the awards, the Commission does not consider these cases sufficiently definite and clear to indicate any recognized previous practice. There were in both cases documents which did not show the pre-enlistment disability and which might have been the basis of the awards.

The conclusion of the Commission is that the ruling laid down in Clause A of the Minute of September 29 without qualification, while not changing the law, did change the interpretation which had been contained in the annotations issued by the Pensions Board in 1919, and also for the first time made it certain that the practice would be to refuse pension to a man who served in France unless he could show that his pre-enlistment disability had increased on service.

EXTENT OF THE EFFECT OF SECTION A OF THE MINUTE OF SEPTEMBER 29, 1921

A practical though not necessarily final consideration is whether any appreciable number of cases were or would be affected.

The existence of the Minute of September 29 did not come to the attention of the G.W.V.A. until May, 1922, when a copy of it was received through the

mail from an undisclosed source. Up to that time Mr. MacNeil had known that since the summer of 1921 there were cases of pension being discontinued on the ground that the disability had pre-existed enlistment and had not progressed on service, but he did not know of any written regulation to this effect. The Minute was produced by Mr. MacNeil before the Parliamentary Committee of 1922 as ground for the claim that secret regulations had been issued by the Pensions Board which restricted the rights of applicants under section 25 (3) (Record p. 1279-1280).

A written statement was filed by the Pensions Board before the Parliamentary Committee explaining Section A of the Minute (Record p. 1294-5). Section A had been tersely negative and restrictive. This explanation gave quite the opposite impression. It set out how wide the real scope of Section 25 (3) was in actual application and pointed out that in only an "occasional and rare" case would pension be refused. The explanation is quoted below:—

> The Minute made by the Board of Pension Commissioners under date of 29th September, 1921, was a statement in abbreviated form for the use of the Board's Medical Advisers at Headquarters.
>
> The Medical Advisers in question were perfectly familiar with the points under discussion and the memorandum merely indicated and confirmed what had always been the interpretation of the policy of the Board.
>
> The Board has always interpreted the intention of Section 25 (3) of the Act to mean that if an ex-member of the forces reached an actual theatre of war and was found on discharge to have a physical condition which pre-existed enlistment, and which had progressed in any way on service, whether affected by service in any way or not—a simple progression having taken place on service—that although it were recognized that the condition must have preceded enlistment, and further recognized that in the *ordinary course of events, in a sheltered existence*, the condition would have progressed no weight was to be given to such information, but the man would be pensionable, not only for the amount of progression, but for the total amount of the disability present.
>
> Section 25 (3) of the Act, therefore, would modify, to the extent outlined above, the qualifications for pension of any ex-member of the forces as defined by Section 11 of the Act. It was found, however, that there was a very *occasional and rare* case where a condition on discharge was found to exist and where it was established to the satisfaction of all concerned that where there had been no progression of any kind on service; no cause or effect even remotely connected in any way with service; a condition present previous to enlistment, unchanged by, or on service. The further question then arose as to whether or not basically such a case would be pensionable if there had been service in an actual theatre of war. The Board interpreted the Act to mean that Section 25 (3) in such a case would be modified by Section 11 and that there must be a service connection in some way, shape or form before there would be pensionability.
>
> *The explanation* of the Board in its interpretaion is *very plain* to the effect that if there has been any progression of a condition on service, if the condition is shown to be in any way worse on discharge than on admission, the pensioner, if he reached an actual theatre of war, must be considered, under section 25 (3) of the Act to be pensionable for the whole extent of such disability. Section 25 (3) of the Act states plainly that "no deduction shall be made from the pension of any member of the forces . . . on account of any disability or dis-

abling condition which existed in him previous to the time at which he became a member of the forces . . ." This has always been interpreted by the Board to mean that before section 25 (3) of the Act becomes applicable there must be presumed to be grounds for pension, and section 25 (3) taken in conjunction with section 11 of the Act does not mean that a member of the forces having served in an actual theatre of war must be pensioned for a disability unless it can be shown that there has been an increase in the disabling condition on service.

It was pointed out to the Board by its medical advisers that those cases would be *very rare* where disability existed after service in an actual theatre of war and and where there would be, as a medical fact, no progression in the disabling condition. In this opinion, as advanced by its medical advisers, the Board fully concurred.

An interpretation of the Act which would permit of pensions being granted in cases where there was no claim on the part of anyone that service had in any way affected the condition, or that there had been progression on service; or, in other words, that the man entered the service and left it in exactly the same condition would be to change entirely the principle upon which pensions are granted and would be contrary to the statutes.

In passing it will be noted that the terms of this statement are in line with Dr. Arnold's evidence before the 1922 Parliamentary Committee, already quoted, as to the reasons leading up to his procuring the Minute (Record, p. 1298): Apparently a new situation had recently developed when "it was found" that there were cases in which there was no progression on service and the "further question then arose" as to whether these cases would be pensioned, and "the Board interpreted the Act" as set out in the Minute of September 29.

The pith of this statement is that section 25 (3) was for the benefit of any man who served in France whose pre-enlistment disability had progressed in any way on service, whether affected by service or not, even though the progress had been no greater than it would have been in the ordinary course of events in a sheltered existence; and that the only man who was cut out by this interpretation was the occasional and rare case where it was "established to the satisfaction of all concerned that there had been no progression of any kind on service, a condition present previous to enlistment, unchanged by or on service."

The opinion expressed in the statement that the cases in which there would be no progression would be very rare, could be concurred in by almost anyone, whether a medical man or not, from the very nature of diseases and physical disabilities and the effect which even the passage of time, to say nothing of service conditions, would be bound to produce. It has, however, appeared in evidence on this investigation that out of slightly more than one hundred cases which were gone into, there were at least seven or eight where the reason given for refusing pension was that there had been no progression or aggravation on service. The number of cases in actual experience therefore which could be affected by this interpretation might be by no means as insignificant as would be at first supposed. It will be seen that the question as to how many cases will be affected by this ruling will depend altogether upon the medical findings, and, judging by the nature of the cases in which it has been decided that there was no progression, it would appear as if there might be a substantial number in which an adverse ruling could be made, and consequently that the apprehension of the G.W.V.A. as to the extent of the effect of this ruling was not unfounded.

As appears from the proceedings of the 1922 Parliamentary Committee (p. 379), the Chief Medical Adviser stated that "Mr. MacNeil's fears were absolutely groundless," and (pp. 358 and 360) that the effect would be "practically negligible," but in the same proceedings (p. 361) it was admitted that if this ruling were not made, low category men would be entitled to the benefit of section 25 (3) and "the effect would be tremendous." This seems to indicate clearly one of two things, either that there are a large number of men, whether low category or otherwise, but who served in France, who will have their pre-enlistment disability counted against them if the ruling set out in section A of the Minute of September 29, 1921, stands, or that the Chief Medical Adviser was in error in thinking that the Minute as drafted is sufficient to prevent low category men from claiming the benefit of section 25 (3). It would appear quite possible that the latter is the correct conclusion because there seems to be no reason to suppose that the disabilities of low category men would not progress on service just the same as the disabilities of A1 men.

Another feature of the effect of the ruling contained in the Minute is well illustrated in a case cited by the G.W.V.A. which had been the subject of a good deal of discussion before the Parliamentary Committee of 1922 (Record p. 1282 and 1441). In that case it was claimed that there was evidence to show that an ear condition had progressed on service. The man died, and it was claimed that death was the result of this progressive ear condition. The death occurred after Sept. 1, 1920. It was claimed by the Pensions Board that in this case it was not sufficient to show progression in order to constitute entitlement to pension under Sec. 11, but that because the death occurred after Sept. 1, 1920, it must be shown that the ailment causing the death was "attributable to" service. The result is that the ruling in Sec. A of the Minute is more far reaching than might at first appear for the reason that, as to disabilities and deaths occurring after Sept. 1, 1920, entitlement under Sec. 11 can only be shown if the disability or death is "attributable to" service, and it is not sufficient simply to show that it was connected with the progression which had been "incurred during" service.

Another limitation growing out of this ruling should be noted. It is admitted that simple progression of the disease or disability during service is sufficient to give the applicant who served in France the benefit of Sec. 25 (3) and the applicant is entitled to pension for the full disability which existed on discharge. The usual rule is that pension is payable from time to time according to the extent of the disability as it may increase or diminish, and re-examinations are made from time to time for the purpose of adjusting the awards in accordance with the changed conditions. (See Pension Act, Sec. 25 (1).). It came out in evidence, however, that in case of pensions which are payable under Sec. 25 (3) simply because of normal progression during service, a rule has been inaugurated whereby the pension granted for the disability on discharge is not subsequently increased to cover any normal progression after that time. No authority was cited for this rule, but it was stated to be the working practice (Record p. 1413, 1416, 1455, 1986, 3420, 3762, 3766-8).

The interpretation contained in Section A of the Minute is also important because it is the foundation for the ruling in Section B:—That is to say, if aggravation or progression were not required by Section A then the circumstance that aggravation had disappeared (which is the subject of Section B) would be immaterial.

The Commission concludes that the effect of the interpretation contained in Section A of the Pensions Board's Minute of September 29, 1921, may result in refusal of pension to a substantial number of applicants who served in France and who would be entitled if the construction contained in the annota-

tions of 1919 were followed. These cases are not confined simply to: (*a*) the cases in which there was no progression on service, but to (*b*) the cases of death or disability occurring after Sept. 1, 1920, which cannot be shown to be attributable to service although connected with the progression on service; and also, (*c*) to cases pensioned because of progression of disability on service but in which increase of pension will be refused if any subsequent increase of the disability is only due to normal progression.

2. *Ruling that where the aggravation has ceased the pension ceases.*

This is the second limitation involved in the construction by the Pensions Board of Section 25 (3). This is also a subject of divergent views between the Pensions Board and the G.W.V.A. It will be dealt with under the same headings as those set out in reference to the ruling requiring pensionability under Section 11 before entitlement under Section 25 (3).

(*a*) *Was this the intention of the section?*

As a matter of interpretation the Pensions Board has the opinion of the Department of Justice which has already been quoted. It is none too clear that this opinion does confirm the contention of the Pensions Board. The question and answer are as follows: —

> Question 2. When the aggravation by service of a pre-existing disability has ceased, is pension indicated for that portion of the disability which pre-existed enlistment?
>
> Answer: I am not aware of any provision, and you do not refer to any, which authorizes payment of pension in respect of a disability, whether by reason of aggravation or otherwise which has ceased."

The question arises whether, if pension were once granted for the full disability, it could be cut off so long as any disability remained in view of the provision of Section 25 (1) authorizing continuance of pension to the extent of the disability. As was previously indicated, it might also be contended that Section 25 (3) in effect authorizes pension for a pre-enlistment disability, and if it does, the continuance of pension would be justified even if service aggravation had disappeared.

Although there may be some question as to the authority of the Pensions Board to make a binding decision in law under the Act in other than an individual case, the Commission considers that, in view of the Board's exclusive jurisdiction and the implied confirmation by the Department of Justice, the express ruling of the Pensions Board to the effect that on the strict legal construction of Section 25 (3) when aggravation has ceased pension should cease, is to be accepted for the purposes of this investigation.

(*b*) *What was the practice up to September, 1921, as to discontinuing pensions granted under Section 25 (3) when aggravation ceased?*

The general evidence on this point is of the same inconclusive nature as that which has been fully gone into on the same point concerning Section A. No practice can be said to have been established in the sense of a series of actual rulings in definite cases. The effect of the evidence goes more to show what would have been the action taken if a case did come up. The evidence as to the views held is to be found in the last sentence of Dr. Arnold's memorandum of June 26, 1922 (Record p. 469), (which indicates that the previous procedure was not to cut off pension unless the disability had ceased). Dr. Arnold's evidence (Record p. 1338) and Judge Margeson's (p. 1048).

The Commission concludes that, if a case came up in which pension was granted under Section 25 (3) simply because there had been aggravation or

progression on service, pension would continue so long as any disability remained. This was not because of any interpretation of the law but because the general understanding among the medical advisers (with two exceptions) was that aggravation could not be said to have disappeared so long as any disability remained. It was impossible to say whether the portion of the disability which had disappeared was the original disability or the aggravation.

(c) Was the practice changed in September, 1921?

Dr. Arnold says (Record p. 1336 et seq.) that there was a discrepancy in opinion among the Medical Advisers in connection with the interpretation of Section 25 (3) and when he first came to the Board of Pensions Commissioners he found lack of unanimity in regard to certain points. He says that it was in connection with this particular point, as to whether an aggravation may be said to cease, that the minute of September 29 emanated in the first place. He says that Dr. Kee and Dr. Shields talked it over with Judge Margeson and they did not believe that, if a man got to France and came back, his aggravation could be said to cease medically. Dr. Arnold asked the Pensions Board what the law was and thought that it might be unauthorized as a matter of law to cut off the pension if aggravation had ceased where the man had been pensioned for the whole disability. He said that much to his "sorrow" he got the Minute of September 29, Sections B and C of which are as follows:—

> B. That in any case previously fully pensionable under Section 25 (3) and in which it is decided that aggravation on service has ceased, further pension cannot be awarded after the aggravation is deemed to have disappeared.
>
> C. That no distinction can be made between disabilities resulting from injury or disease, and that decision as to whether aggravation had disappeared is purely a medical one, and must depend upon the circumstances of each individual case."

Dr. Arnold says he went to the Board, with two or three doctors, and put the matter up to the Chairman and said they should have the point settled as soon as possible (Record p. 1339). He says he found there had been two of the medical advisers, Dr. Barnes and Dr. Bond, who were firm in the opinion that if the aggravation had ceased, even if the man had been pensioned under Section 25 (3), the pension should cease. Further that, when the Minute of September 29 was received, the question arose as to how they were going to handle it and that it was agreed to avoid the possibility of trouble simply by deciding that in no case could it be said that the aggravation had ceased where any disability remained. Thus no room would be given for the application of the law as set out in the minute.

An unfortunate circumstance about this decision of the Medical Advisers was that, apparently, it was not communicated to Dr. Bond or Dr. Barnes, who were the two men whom it was necessary to bring into line in order to secure uniformity (Record p. 1339-40, 1368, 1388).

Dr. Arnold says that the Chairman of the Board, in giving this ruling, said he would have nothing whatever to do with the question of medical interpretation, that it was up to the Medical Advisers to do as they liked, but that this was the law (Record p. 1369)

Dr. Arnold said he did not consider it necessary to send the minute out to the units in the field on account of the very few cases which would be affected and that they considered it was easier to secure uniformity by checking up the cases as they came into the head office (Record p. 1370-72). The evidence of

the Unit Medical Directors showed that there was no uniform conception by them as to the practice that was to be followed in cases of this kind (Record p. 1373) and so, as far as the units were concerned, no steps were taken at that time to secure any uniformity of practice in respect to these cases (Record p. 1366).

The statement is made repeatedly in the evidence that the cases in which it could possibly be said, as a matter of medical opinion, that aggravation had ceased were so few that the rule would never have any practical effect in cutting down pensions, and the Commission from the evidence given considers that this is to a large extent true. At the same time the matter was regarded as important enough to form the subject of discussion by the Medical Advisers and of formal ruling by the Board itself, and it must be taken as a serious attempt to deal with an actual problem.

As has been said, this Minute was promulgated to the Assistant Medical Advisers after its receipt by Dr. Arnold (Record p. 1363), and was distributed without any memorandum to indicate what was to be done as a matter of practical policy in cases which might come up, whether they might be rare or frequent.

The result of distributing this Minute without any covering memorandum was that it was accepted as authority according to its terms by at least two of the medical advisers, Drs. Barnes and Bond. Dr. Bond cited it as authority for refusing pension in a case from Toronto (Record p. 1313). Dr. Belton, Pensions Medical Examiner at Toronto and formerly Chief Medical Adviser, wrote head office under date of May 15, 1922, bowing to the ruling but saying:

> this minute of wiping Sec. 25 (3) out of the Pension Act explains the attitude of H.O. on a number of cases which had not heretobefore been understood.

Dr. Barnes took action similar to Dr. Bond in a case from Winnipeg in February, 1922, (Record p. 1333). This case was brought in the evidence to the attention of Dr. Arnold who frankly admitted (it does not appear just when) that the case had been handled in the most slip-shod manner all the way through, both in the unit and at headquarters (Record p. 1334, 1360, 1362). On June 2, 1922, the same ruling was confirmed by Dr. Burgess in a letter as follows (Record p. 1335):—

> Your letter of the 31st ult., is herewith acknowledged. The marginally noted was in receipt of pension for disability which pre-existed enlistment but was aggravated during service. *Pension was discontinued* when it was considered that the *aggravation during service had ceased.* Any subsequent recurrence of the disability cannot fairly be attributed to service, and is, consequently, not pensionable.
>
> Signed—B
> W. A. Burgess.

Dr. Burgess (Record p. 1378) says he sent this letter out thinking the case was one where the man had only seen service in England, but the file shows plainly he had been awarded the year before pension for full disability (Record p. 1360).

There was also another case in which a similar ruling was made on February 2, 1922 (Record p. 1412) and still another on March 14, 1922 (Record p. 651).

Dr. Arnold says that the Winnipeg case was the one that brought to his attention the fact that uniformity was not being observed (Record p. 1336-1373). After this case was brought up and after the telegram the subject of this inves-

tigation was published, a letter was sent out (Record p. 1335) on Dr. Arnold's instructions (Record p. 1377) under date of June 22, 1922, referring to the Winnipeg case and containing the following paragraph:—

> 3. Cases such as this have been discussed and *it has been decided that as long as any disability remains, it will be considered that some aggravation still persists and he will be pensioned for his whole disability.* An instruction will be issued concerning this point.

The letter was signed by Dr. Barnes "for Secretary, B.P.C."

Meantime the statement of the Pensions Board respecting the Minute of Sept. 29, 1921, had been placed before the Parliamentary Committee but no comment on Section B of the Minute was made in the statement. Dr. Arnold however gave evidence before the Parliamentary Committee in reference to its meaning (1922 Parliamentary Committee Proceedings p. 414). In answer to Mr. Black, M.P., Dr. Arnold said:—

> *This section B is worded in a way which to an outsider would lead to absolute misapprehension.* The word 'aggravation' should not have been used. To a lay-man it is *confusing.* It is perfectly plain to me, and it means this; if a man gets to France and has an aggravation or disability and simple progression on service, he then is pensionable on account of the aggravation for the whole disability, the original and the exacerbation. *To say that when his aggravation ceases that he then is not pensionable means, that when his disability ceases he is not pensionable. That I explained fully to Mr. MacNeil a few nights ago.*
>
> Q. *That is absolutely contrary to what it says here.* It says 'when the aggravation ceases'. When that aggravation ceases you cancel the whole pension.—A. *In* 25 (3) *we don't distinguish* between *aggravation* and *disability,* you group them.
>
> Q. Under this interpretation as soon as this aggravation ceases you cancel the whole pension?—A. No. The *whole disability would have to cease before that becomes applicable.*
>
> *By Mr. Caldwell:*
>
> Q. Take the man who was 20 per cent disabled and it progressed. He comes back 40 per cent disabled; his disability increased 20 per cent. Is his pension cut off?—A. No. He would have pension for the total amount of the disability.
>
> *By Mr. Black:*
>
> Q. What does this mean "that in any case previously fully pensionable under Section 25 (3) and in which it is decided that aggravation on service has ceased, further pension cannot be awarded after the aggravation is deemed to have been disappeared."—A. It is somewhat contradictory, but that I told you is the meaning of the Section.
>
> Q. What is the effect of it. Do you not cancel the pension?—A. *Not until the whole disability has ceased.*
>
> Q. That is his original disability he had on service as well as the aggravation?—A. *No, his whole disability would have to cease or else Section 25 (3) would not be lived up to at all.*
>
> Q. This subsection is entirely misleading.—A. *It may be misleading, but that is the accepted meaning among the medical advisers and the method under which the clause is interpreted.*

On June 26th, the "instruction" which was promised in the letter of Dr. Barnes of June 22 was sent out. The instruction was as follows. (Record p. 469):—

No. 1765. Interpretation of the provision of the Pension Act as applied to cases of aggravation. Enclosed herewith is a copy of the minute passed to Headquarters Medical Advisors under date of Sept. 29th, 1921. It appears that copies of this minute have reached some of the Units and it seems necessary, therefore, to avoid confusion, that copies be sent to all Units with an interpretation which will be understood by all.

When the minute was passed to the Medical Advisors from the office of the Deputy Minister, it was conceded by the Medical Advisors that *there might be confusion* in connection with the interpretation of subsection (*b*), and it was largely because of the possibility of such confusion that copies were not distributed to the Units.

The Minute illustrates the law and its application to Section 11 as related to Section 25 (3) of the Pension Act. The procedure which apparently had always been in force is clearly worded in subsection (*a*), and means that unless there has been some progression on service of an alleged disability, or, in other words, than an old disability has been changed on or as a result of service, there is no pensionability under Section 25 (3).

Clause (*b*) of the Minute has been the subject of conferences of the Medical Advisors.

The extreme difficulty of decision as to cessation of aggravation or progression on service was conceded by all. It was agreed that from a medical viewpoint, cases which could be so decided would be so rare as to be negligible, and it was further *unanimously agreed that for practical purposes* the clause would not be applicable *unless disability had ceased or was considered to be negligible.* Such *practicable application of clause (b) did not, in the opinion of the Medical Advisors, change previous procedure in force.*

Signed W. C. ARNOLD,
Director Medical Services.

The following letter was also sent to the Toronto office by Dr. Arnold on June 19, 1922 (Record p. 1149-51 and Exhibit H.D.D. No. 71):—

I was not aware that copies of Board of Pension Commissioners Minute addressed to the Deputy Minister under date of September 29 had left Headquarters.

When the Minute was originally passed to me for some discussion, it was conceded that there might be confusion in connection with the interpretation of subsection (*b*). This section was fully understood I think, by the Medical Advisors at Headquarters and as far as they were concerned needed no amplification.

The whole discussion had to do originally with the application of Section 11, in connection with Section 25 (3), of the Pensions Act, and the ruling which apparently had always been in force is clearly worded under Section (*a*) and means that unless there has been some progression on service of an old disability, or in other words, that an old disability has been changed on or as a result from service, there is no pensionability under Section 25 (3) of the Pensions Act.

The interpretation, therefore, to be placed on Section (*b*) *is not in accordance with the wording of the section*—the case for pension having been considered under Section 25 (3) and found to be pensionable can no longer be considered as an aggravation case, there then being *no dis-*

> *tinction between aggravation and original disability and you must interpret Section (b) to mean that the whole disability must have disappeared before pension ceases.*
>
> Now that the Minute has reached your unit it will of course be quite necessary that the above explanation of Section (b) be made known to the Pension Division.

In considering whether section B of the Minute of September 29 expressed correctly the way in which these cases of aggravation were and would be dealt with, it is only necessary to refer to Dr. Arnold's evidence above quoted, and to the explanatory letters dated June 19 and June 26 also above set out. Dr. Arnold states clearly that instead of following the terms of the Minute and cancelling the pension as soon as the *aggravation* has ceased, it is not to be cancelled until the *whole disability* has ceased. In the Memorandum of June 19 it is expressly stated that

> the interpretation . . . to be placed on Sec. B is not in accordance with the wording of the section.

and it goes on to say that once a case comes under Section 25 (3) there is then no distinction between aggravation and original disability, and

> you must *interpret* Sec. B to mean that the *whole disability must have disappeared* before pension ceases.

Again, in the Minute of June 26, it is said

> It was further unanimously agreed that for practical purposes the clause would not be applicable unless disability had ceased or was considered to be negligible.

It would hardly be necessary to have a special Minute to say that, when the disability ceased, pension would cease and these directions in plain terms meant that Section B of the Minute was to be disregarded. That the previous procedure of continuing pension so long as any disability remained would not have been in accord with the Minute of September 29 is indicated by the last sentence of the Minute of June 26 which says

> Such practical application of clause (*b*) did not in the opinion of the Medical Advisers change the previous procedure in force.

The evidence of Judge Margeson also shows the inconsistency, in his opinion, of the Minute of September 29 with the practice which was to be followed as understood at Head Office. He distinguishes between the portions of the Minute which have to do with disability under Sec. 11 (Sec. A) and the portion which has to do with the cessation of aggravation (Sec. B). His evidence is (Record p. 1040-50) to the effect that he considered Sec. A and B correctly set out the law, but that in the practical application headquarters would have to discuss these interpretations with the medical advisers and issue a memorandum. He says he would not have allowed the Secretary of the Pensions Board to send that Minute to the Deputy Minister of the D.S.C.R.

> unless there was a covering memorandum. "This is to make no change in practice."

He says it was sent to the D.S.C.R. officially in order to reach Dr. Arnold, and he intimates that probably Dr. Arnold understood that the legal interpretation was not to be put into practice.

Judge Margeson's attention was called to the fact that he did not sign the Minute of Sept. 29; he answered (Record p. 1050):

> I know I didn't, but I mean to say as far as the legal interpretation is concerned, I would be willing to sign it, but as far as the practical carrying out is concerned I think that memorandum should have been at the bottom, and certainly would have been if it was intended for anybody who would act upon it.

Col. Belton stated that he had instruction from the Head Office to carry out that Minute literally (Record p. 1110) and he probably is referring particularly to the Toronto case already dealt with (Record p. 1313) although he mentions some other cases in which he intimates the same principle was applied.

The Commission considers that Section B of the Minute while it set out the law did not adequately set out the practice which would have been followed theretofore, nor the practice which was intended to be followed for the future. The law as laid down in the Minute was that when aggravation disappeared pension ceased and that according to Section C of the Minute it was open for the medical men to find that aggravation had disappeared. The practice was, however, that the law was to be in effect disregarded by deciding that the aggravation had not disappeared so long as there was any disability; or, as it is put by the Chief Medical Adviser, that the law was to be interpreted to read that when the disability ceased pension ceased. As appears from the evidence Section B of the Minute was supplemented by the verbal understanding then arrived at between Dr. Arnold and the medical advisers as to how it was to be applied (Record p. 1340). Section B plus this verbal understanding correctly embodied the practice to be followed as previously understood. This understanding however was the action not of the Pensions Board but of the medical staff. The Pensions Board had intimated that all it could do was to state the law.

EXTENT OF THE EFFECT OF SECTION B OF THE MINUTE OF SEPTEMBER 29, 1921.

The evidence shows three or four cases in which the pensions of men who had served in France were cut off because aggravation had ceased. These decisions were the result of two of the Medical Advisors not being informed of the verbal understanding which had been arrived at regarding the application of Section B. There may be others as the cases before the Commission were generally produced as type cases. The carrying out of instructions contained in the memorandum issued by Dr. Arnold on June 26, 1922 (Record p. 469) should obviate any further adverse decisions on this ground.

INTERPRETATION OF "OBVIOUS" DISABILITIES

Section 25 (3) does not permit a man who served in France to be pensioned for a disability which was "obvious" on enlistment. Complaint is made by the G.W.V.A. that this term "obvious" has been the subject of increasingly strict construction, contrary to the explanation of the representatives of the board as to what was intended by the word. By this exception it was apparently intended to prevent a man from claiming pension for a disability which he had on enlistment and which although not mentioned on his documents was so apparent that anyone would see it, and the man could not have expected, nor the country be presumed to have taken responsibility for, pension for that disability. There is no evidence of any representation before the Parliamentary Committee of 1919 as to the interpretation which would be given the word in practice.

A few weeks after the Act came into force the following instruction was issued as to the interpretation (Record p. 2725).

THE BOARD OF PENSION COMMISSIONERS FOR CANADA

MEMORANDUM

To Dr. Kee,

From the Secretary.

Ottawa, September 20, 1919.

The word "obvious" as used in paragraph (3), article 25, chapter 43 of the Pensions Act under date July 7, 1919, shall be interpreted as follows:

> A condition that is perfectly manifest, easily and plainly perceived, immediately evident to an unskilled observer.
>
> Of course the condition is to be exhibited. If it is not, there is an intentional concealment.
>
> Congenital defects must be considered as obvious.

(Sgd) Stanley B. Coristine,
Secretary.

Dr. Belton evidently had this memorandum issued (Record p. 1166). In 1920, speaking before the Special Parliamentary Committee, (1920 Parliamentary Committee Proceedings p. 329, Record p. 1268) Dr. Burgess said:

> The only cases who get to France and do not *get a pension for the full disability are very obvious cases*—the loss of an eye or the loss of a finger or foot, something of that nature, something that a layman on looking at the man would say "why that man has lost his finger. He is not fit." That is the only interpretation we put on the word "obvious".

In 1921 (1921 Parliamentary Committee Proceedings p. 53, Record p. 1271) Mr. MacNeil was suggesting the necessity for some clear definition of the word "obvious" because he had in mind a case in which there had been some eye trouble on enlistment which had, he claimed, only developed into a cataract during service and in which pension was being refused on the ground that the condition was obvious on enlistment. Dr. Burgess thereupon gave the Committee what was considered to be the meaning of the word "obvious" (1921 Parliamentary Committee Proceedings p. 54, Record p. 1272):

> What we consider as obvious is a condition which is obvious to a layman on examination. We presume that the man has been stripped when being examined, and the lose of a toe, or the portion of a hand, or the portion of a foot, would be considered obvious to a layman. It is not what we consider obvious, but what would be obvious to a layman. Rheumatism would not be obvious unless the man was so crippled up as to give good evidence. Rheumatism is not considered obvious. I know something about the case Mr. MacNeil has brought up, though I do not know all the details; but if a man has a cataract in his eye, that man undoubtedly suffers from a high degree of defective vision, and that would be considered as obvious. If the man's cataract was not obvious, his vision would not be very much affected. If the man's eyesight was very seriously impaired, those with whom he came in contact would know it. It would be obvious. But if a man suffered from a slight impairment of vision only, it would not be obvious. The word "obvious" applies in most cases to those who have lost a portion of their hand or of their foot, or to those who are blind in one eye. That is the class of case that comes within the definition of the word "obvious".

The above statement needs no elaboration. The class of disabilities regarded as "obvious" is clearly indicated. There were cases presented on this Investigation which, in the opinion of the Commission, indicated that the Pension Board had considerably widened the definition laid down by Dr. Burgess, and would and did treat as "obvious", and therefore not pensionable, disabilities much less apparent than those described by Dr. Burgess in the passages above quoted. In the cases produced were disabilities such as ear trouble (Record p. 1443), slight varicose veins (1458), back condition (1467), mental deficiency (2105), fractured femur (1917); as to all of which it was claimed that pension might be refused on the ground that they were obvious.

Recapitulation and Conclusions re: Section 25 (3).

(*a*) Section 25 (3) deals with the pre-enlistment disability of the ex-service man who served in a Theatre of War.

(*b*) Previous to 1918 the practice had been to deduct the percentage of pre-enlistment disability from the disability at discharge and to pension for the difference.

(*c*) The contention in 1918 was that if a man passed the Medical examinations in Canada and in England and served in France, he should be presumed for pension purposes as "fit" on enlistment.

(*d*) The general principle was accepted and a proposed amendment to the Pensions Regulations was submitted by the Pensions Board to the 1918 Parliamentary Committee; the latter made a recommendation in different form and a new regulation based on this recommendation was passed by the Pensions Board on July 2, 1918, and later in December, 1918, an Order in Council (P.C. 3070) was passed for the same purpose. The provisions of the Order in Council were embodied almost verbatim in Section 25 (3) of the Pension Act, 1919.

(*e*) The Hon. Mr. Rowell, Chairman of the 1919 Parliamentary Committee, explaining the Act in the House when the Pension Act was under consideration, stated that the Committee felt that if a man was passed medically, and he actually got to the front, the country should ignore any question of pre-existing disability and grant him a pension.

(*f*) The wording of the section is that "no deduction shall be made from the pension" on account of any pre-enlistment disability. The wording of the clause which had been recommended by the Pensions Board to the 1918 Parliamentary Committee was "that pensions be payable" for any disability which appeared more than three months after enlistment, whether it existed on enlistment or not. It was the 1918 Parliamentary Committee which changed the phraseology to read "no deduction," etc..... The idea of "deduction" appears to have been suggested by the previous practice of deducting the pre-enlistment disability from the discharge disability, but the phraseology adopted spoke of deducting from the "pension".

(*g*) The only dispute arises where the disability on discharge is no greater than on enlistment. The Pensions Board says in a Minute of September 29, 1921, that Section 25 (3) only applies if there is entitlement to Pension under Section 11, and that therefore an increase of disability during service must be shown. The G.W.V.A. claims that a man who served in France was pensionable for anything he had on discharge if it was not obvious or wilfully concealed on enlistment, or if it was not congenital, or if of so minor a character that it would not have caused rejection from service. These exceptions are stated in Sec. 25 (3).

(*h*) There was no representation or undertaking on the part of the Pensions Board as to what the legal effect of the section as passed would be.

(*i*) With the passing of the Pension Act, the Pensions Board issued Annotations which stated that whoever got to France was pensionable for any disability which existed on discharge unless the disability was obvious or concealed on enlistment. The S. 25 (3) Annotation also stated that it had been urged that pensions be awarded for the discharge disabilty whether the "whole or a proportion" of that disability existed on enlistment. The Annotations further stated that the 1918 Parliamentary Committee decided that if a man reached France "it must be definitely presumed that he was absolutely fit upon enlistment" unless his pre-enlistment disability was concealed or obvious or so minor as not to cause rejection from service.

(*j*) The question then arose, on this investigation, whether the interpretation in the Annotations had been applied by the Pensions Board up to September 1921 when the ruling above referred to was made. A mass of evidence was given by officials of the Pensions Board and the G.W.V.A. to show what would have been the ruling where there was no increase on service. A very few cases were presented but these were too equivocal and isolated to constitute any satisfactory evidence of practice. Apparently the occasion for a definite ruling did not arise because it was presumed that a man who got to France was "fit" (for pension purposes) on enlistment, or it was accepted that if there was pre-enlistment disability it must naturally have progressed on service in France.

(*k*) The Commission considers that the only authoritative interpretation, after the 1919 Act was passed, was that contained in the Pension Board's Annotations above quoted, and that there can be said to be no accepted practice to be deduced from the few cases referred to. The lack of unanimity among the witnesses made it impossible to determine with any degree of certainty what practice would have been adopted if cases had come up, although it was thought that, notwithstanding the Annotations, pension would have been refused.

(*l*) In the summer of 1921 the Pensions Board's staff was absorbed by the D.S.C.R., and later Dr. Arnold, the Director of Medical Services of the D.S.C.R., became also Chief Medical Advisor of the Pensions Board. The G.W.V.A. says that shortly after this it was realized that there was a departure from the policy of pensioning a man who had served in France for whatever disability he had on discharge.

(*m*) Shortly after Dr. Arnold became Chief Medical Advisor, hypothetical cases were put to him questioning as to whether a man who served in France was pensionable for a disability which was exactly the same on discharge as on enlistment. Dr. Arnold also found no unanimity of opinion as to whether a man who had been pensioned on account of an aggravation on service would have that pension cut off if aggravation disappeared.

(*n*) Dr. Arnold asked for a ruling on these two points, and the Minute of September 29, 1921, was passed by the Pensions Board setting out: (A) that Section 25 (3) did not apply unless the applicant was entitled under Section 11; (B) that when the service aggravation had disappeared the pension ceased; and (C) that the decision as to whether the aggravation had disappeared was purely medical, and dependent on the circumstances of each case. (A) will be considered first.

(*o*) The ruling that a man must be entitled under Section 11 before getting the benefit of Section 25 (3) imposed a definite limitation on the interpretation which had been contained in the Annotations of 1919. It was the first time such a ruling had been put on record in writing. The Commission considers that some notice and explanation should have been given that the strict interpretation of the Act had made this ruling necessary.

(*p*) The Minute was passed to the Assistant Medical Advisors at Head Office but was not sent out to the units.

(*q*) As to the contention of the G.W.V.A. that the ruling was not correct in law, the Pensions Board is its own interpreter at least in actual cases and possibly by express though abstract rulings such as this. There are, however, considerations which might justify an interpretation in conformity with the Annotations, i.e. either: that "pension" as used in Sec. 25 (3) may not mean the net pension under Sec. 11, but denotes an award which includes a percentage for pre-enlistment disability because the section provides that the pre-enlistment disability is not to be deducted from it, and that the section therefore, by using the word "pension" in this sense, grants a prima facie pension for the whole of the discharge disability and at the same time prevents the deduction of the pre-enlistment disability; or, that Section 11 gives prima facie a pension for whatever disability exists on discharge which can then be reduced or extinguished by showing the pre-enlistment disability.

(*r*) On June 15, 1922, when the telegram under investigation was published, the Pensions Board obtained an opinion from the Department of Justice which confirmed their ruling that a man must be entitled to pension under Sec. 11 before the provisions of Sec. 25 (3) applied. The Commission considers therefore that for the purposes of this investigation this ruling of the Pensions Board is to be accepted. This opinion also advised that the Pensions Board, in granting pension where the disability had only progressed normally, may have been more favourable to the applicant than the strict interpretation of the law would justify.

(*s*) The existence of the Minute of September 29 was not known by the G.W.V.A. until May, 1922, when a copy of it was received through the mail from an undisclosed source. The G.W.V.A. had however known that, since the summer of 1921, there were individual cases of pension being discontinued on the ground that the disability had pre-existed enlistment and had not progressed on service.

(*t*) The Minute was produced by the G.W.V.A. before the Parliamentary Committee of 1922 as ground for the claim that secret regulations had been issued by the Pensions Board which restricted the rights of applicants under Sec. 25 (3). The Pensions Board filed a written statement that the Minute confirmed what had always been the "interpretation of the policy of the Board," and that the Board's construction had always been that simple normal progression of disability on service entitled a man who had served in France to pension. The statement indicated further that "it was found" that there was an "occasional and rare case" where the condition on discharge was the same as on enlistment, and that the question "then arose" whether these cases would be pensionable, and that the Board interpreted the Act to mean that Sec. 25 (3) would be modified by Sec. 11 and pension would not be payable. It pointed out also that to interpret the Act to mean that pension should be granted where—

> there was no claim on the part of anyone that service had in any way affected the condition or that there had been progression on service; or in other words that the man entered the service and left it in exactly the same condition would be to change entirely the principle upon which pensions are granted and would be contrary to the statutes.

As to this latter statement it should not be forgotten that the interpretation which admittedly gave a man a 25 per cent pension for a disability, 20 per cent of which might have existed before he ever enlisted, showed that the statute did not confine pensions to what actually occurred on service.

(*u*) As to extent of the effect of this interpretation, it depended entirely on the medical findings. There were at least seven or eight cases out of one hundred

before the Commission in which it was found that there was no progression and pension was refused. It is quite possible therefore that the cases which could be affected were not so infrequent as might have been supposed.

(*w*) Before the Parliamentary Committee, the Chief Medical Advisor urged that the fears of the G.W.V.A. were groundless, and that the effect would be practically negligible; but at the same time he stated that if the ruling were not made, low category men would be entitled to the benefit of Section 25 (3) and the effect would be tremendous. The Commission questions whether the ruling affects low category men any more than A1 men.

(*ee*) The Commission considers that the effect of the interpretation contained in Sec. A of the Minute of September 29 may result in the refusal of pension to a substantial number of applicants who would have been entitled under the construction of Sec. 25 (3) contained in the Annotations of 1919. These would be: (*a*) cases where there has been no progression on service; (*b*) cases of death or disability coming within the 1920 amendments which require that they be shown to be attributable to service; and (*c*) cases pensioned because of progression on service, but in which increases of pension in accordance with the progress of the disability after discharge will be refused.

(*x*) Sections B and C of the Minute of September 29 remain to be considered. The effect of these sections is that, where pension has been awarded because of aggravation or progression on service, it is to be cut off as soon as the portion representing the aggravation or progression according to medical opinion has disappeared.

(*y*) This question was also dealt with in the opinion of the Department of Justice which does not clearly confirm the Pensions Board's ruling; but in view of the exclusive jurisdiction of the Pensions Board hereinbefore referred to which may possibly apply to general rulings such as this, the Commission considers that the ruling of the Pensions Board is to be accepted for the purposes of this investigation; Section 25 (1) however, affords strong ground for a different construction.

(*z*) As to the practice up to September, 1921, the Commission considers that because of the general understanding among the Medical Advisors (with two exceptions) that aggravation could not be said to have disappeared so long as any disability remained, the practice had been to make no finding that the aggravation had disappeared, but to continue the pension until the whole disability should cease.

(*aa*) Dr. Arnold asked the Pensions Board for a ruling as to whether, when the aggravation had ceased, pension ceased. This was particularly desired in view of the opinion of two of the medical advisors, who considered that, if the aggravation had ceased, pension should cease. The Minute of September 29 was received to the effect that pension should be cut off where the aggravation had disappeared, and Dr. Arnold was told that that was the law and that the Pensions Board would have nothing to do with the question of medical interpretation. The Commission considers that, where the personnel of the Pensions Board contained two medical men, the responsibility should have been taken by the Pensions Board itself to ensure that pension was not cut off so long as any disability remained according to the accepted understanding.

(*bb*) It was immediately agreed by the Medical Advisors that in no case would a finding be made that aggravation had ceased so long as any disability remained. Unfortunately, although they had the Minute, this agreement practically annulling it was not communicated to Dr. Bond nor to Dr. Barnes, who had been of a different opinion.

(*cc*) In February and March, 1922, Dr. Bond and Dr. Barnes both made rulings in actual cases cutting off pension because aggravation had ceased. The

Minute was expressly quoted as authority for cancelling the pension in one of these cases. Another of these cases was brought to the attention of Dr. Arnold who took pains to see that Dr. Bond and Dr. Barnes under-stood what had been agreed on. There were at least two other cases in February and March, 1922, in which similar rulings were made. The grounds for these rulings were new in the experience of the G.W.V.A.

(*dd*) As has been stated, the Minute came to the attention of the G.W.V.A. in May, 1922, and was considered to be the cause for the adverse rulings which had been received. Without disclosing its knowledge of the existence of the Minute, the G.W.V.A. discussed the matter with the Pensions Board which claimed that there was no change in practice.

(*ee*) The effect of Dr. Arnold's evidence before the 1922 Parliamentary Committee was that Section B as drafted did not represent what was done in actual practice, because, instead of the pension being cut off when the aggravation ceased, as stated in the Minute, it would continue until the disability disappeared.

(*ff*) On June 19, 1922, Dr. Arnold wrote the Toronto office that the interpretation to be placed on Section B was not in accordance with the wording of the section and that, where pension was once awarded under Section 25 (3), there then would be no distinction between aggravation and original disability, and that Section B must be interpreted to mean that the whole disability must have disappeared before pension ceased.

(*gg*) On June 22, 1922, (after the publication of the telegram), a letter was sent out, on Dr. Arnold's instructions in connection with one of these cases, stating that it had been decided that as long as any disability remained it would be considered that some aggravation still presisted, and that the man would be pensionable for his whole disability; an instruction to be issued concerning this point.

(*hh*) On June 26, a general instruction was issued by Dr. Arnold stating that it was agreed for practical purposes that, unless disability had ceased or was considered to be negligible, Section B would not be applicable. This in effect was a direction that this Section was to be disregarded.

(*ii*) The Commission considers that Section B of the Minute did not set out the practice, and that the verbal understanding arrived at between the medical advisers (which left no room for the operation of the Section) was necessary to correctly describe this practice.

(*jj*) So far as the evidence shows, only a very few cases have been adversely affected by Section B. The subsequent written instructions sent out should obviate further adverse decisions on this ground.

(*kk*) The Commission is convinced that there is grave doubt as to whether the interpretation contained in the Pensions Board's Minute of September 29, 1921, requiring pensionability under Section 11 before Section 25 (3) is applicable, was contemplated or intended at the time the Statute was passed; and it considers that the effect of this interpretation should be brought to the attention of Parliament for such action as may be considered advisable.

(*ll*) The Commission is further of opinion that, in view of the circumstances hereinbefore set out as to the application of Section B of the Minute of September 29, 1921, all cases within the provisions of Section 25 (3) in which pension has been discontinued on the ground that aggravation or increase of the disability on service has ceased or disappeared, should be reviewed and adjusted on the basis of the ruling contained in the general instruction of June 26, 1922, above referred to.

PART FOUR

COMPLAINTS RE RETURNED SOLDIERS' INSURANCE ACT

Amplifying its original telegram, the G.W.V.A. claims:—

(*a*) That regulations were secretly introduced under which the Board assumed power to reject applications for insurance policies, under the Returned Soldiers' Insurance Act, on medical grounds, despite the decision of Parliament that such insurance would be available to all qualified applicants without regard to condition of health at the time of application.

(*b*) That the aforesaid regulations have been illegally concealed and that adverse decisions have been rendered thereupon without disclosing same to the individuals affected, thus causing great distress and dissatisfaction.

The substantiation or not of these complaints may probably be best followed by giving the history of the Returned Soldiers' Insurance Act (10-11 George V. Chap. 54 assented to July 1, 1920, and effective September 1, 1920) from its inception and its application to date.

The Special House Committee on Soldiers' Civil Re-establishment (Chairman Hon. J. A. Calder) Third Session of the Thirteenth Parliament, in the autumn of 1919, in its proceedings (Page 361) states that a Resolution from the Army and Navy Veterans in Canada was laid before it thus:—

Whereas a large number of men who enlisted during the late war are so placed financially that they are unable to make suitable provision for their dependents, other than by way of life insurance;

And whereas a large number of men, who by reason of disabilities incurred *while in service* are now unable to procure life insurance;

And whereas certain provisions have been made by way of pensions and allowances paid during the lifetime of the said men, but no provision made, after their decease *for their dependents;*

And whereas it is in the interest of Canada that such men should not be penalized, and their dependents be made to suffer by reason of no such provision having been made;

Now therefore we, the Dominion Executive of the Army and Navy Veterans in Canada, do urge upon the Federal Government the urgent necessity of issuing life insurance policies to all pensioners and other returned men at present unable to obtain life insurance through *disabilities occasioned by their service*, who may apply for same, in a sum not to exceed two thousand dollars, ($2,000), and that the premiums charged be those now in force for an A1 risk for a straight life policy, and based upon the attained age of the applicant, said policies to designate as beneficiaries, *applicants dependents only*, and the amount written to be payable only on the death of the assured.

Page 659 of same proceedings mentions that Mr. C. G. MacNeil, Dominion Secretary of the Great War Veterans' Association, submitted a memorandum mentioning, amongst other matters, further requirements of re-establishment as follows:—

(*d*) Life insurance facilities for disabled men debarred from the benefits of ordinary life insurance enabling them to safeguard the future of *their dependents.*

In its report to the House (Page 54) the Committee says:—

> Suggestion (21)—Various suggestions were made to your Committee with a view to obtaining assistance for those ex-members of the forces who, because of *disability incurred on service* are debarred from obtaining insurance at prevailing rates from insurance companies or fraternal organizations.
>
> Recommendation.—Your committee feel that further investigation by experts and actuaries is necessary before an intelligent recommendation in this matter could be made to Parliament. They consider the matter worthy of fullest consideration, and that such investigation should be made with a view to ascertaining the feasibility of working out a just and equitable plan.

In the following session of 1920, Special Committee on Pensions and Re-establishment (Chairman Mr. Hume Cronyn) received a Resolution from the Great War Veterans' Association, thus:—

> Whereas many ex-members of the Canadian Expeditionary Forces are suffering from disabilities incurred *while on active service*, which disabilities prevent them from securing life insurance *for the protection of their dependents.*
>
> And whereas physical fitness was proven by medical examination before enlistment, and, therefore, subsequent disability must be considered as *resulting from active service.*
>
> And therefore be it resolved, that we, The Great War Veterans' Association of Canada, in Convention assembled, urge upon the Government the immediate necessity of State assistance to all returned men anxious to take out life insurance to enable *disabled men* to be in a position to *secure protection* in any recognized form of life insurance, at standard rates; the Government of Canada assuming the responsibility of payment of any increase in rates due to physical or mental deficiencies *resulting directly or indirectly* from war service.
>
> And further be it resolved, in view of the fact that the Parliamentary Committee in September, 1919, recommended an immediate investigation of this problem by actuarial experts we profoundly regret the delay of the Dominion Government in acting upon this recommendation, and, further, in view of the Acting Prime Minister's pledge given recently, we urge immediate legislation to meet one of the most urgent problems confronting our comrades.

This Special Committee of 1920 was largely instrumental in bringing into being the Returned Soldiers' Insurance Act of 1920 (Chap. 54) as now in the Statutes.

The main provisions of this Act are:—

> *Section 3.*—The Minister may enter into an insurance contract with any returned soldier *domiciled and resident in Canada* or with any widow *so domiciled and resident*, providing for the payment of five hundred dollars on any multiple thereof, not, however, exceeding five thousand dollars, in the event of the death of the insured (underlined portions struck out in 1921).
>
> *Section 13.*—The Minister *may* refuse to enter into an insurance contract in any case where there are, in his opinion, sufficient grounds for his refusing.

Section 15.—No *medical examination* or other evidence of insurability shall be required in respect of any contract, issued under this Act; Provided, however, that the Minister *may*, for the purpose of determining whether he shall refuse to enter into a contract of insurance in any case under the provisions of Section Thirteen of this Act, *require such medical examination* or other evidence of insurability of the insured as he may deem necessary.

Section 20.—No application for insurance shall be received under this Act after the first day of September, nineteen hundred and twenty-two (Extended in 1922 to September 1, 1923).

During the preparation of the original Act, the 1920 Special Committee questioned Mr. G. D. Finlayson, Superintendent of Insurance of the Department of Finance, and largely responsible for the framing of the Act, as to the reason for Section 13 (formerly Section 11 in draft of the Act). He says (Page 386 of Committee Proceedings and Record p. 1729):—

> The Minister *may decline* to enter into an insurance contract in any case where there are in his opinion sufficient grounds for his doing so.
>
> I think that there would be excluded men whose disability is *self-inflicted*, and it would rule out the case of disability caused by a man's immorality; syphilitic disability would probably be ruled out. There might be other cases where collusion was apprehended, *fraudulent insurance*. I think the Minister should have the right to *refuse such cases as that*. It is possible that those cases which should be ruled out should be more definitely mentioned in this Bill. That is, I think, a question for consideration as to whether we should go still more into detail.

(Comm. Proceedings p. 429 Record P. 1731) Mr. Finlayson repeats:—

> It is intended that the Minister should have the right *to decline* to enter into a contract where a man is disabled through *self-inflicted injuries*, or through *immorality*. It is intended to debar *syphilitic cases*. I think there would be a very strong objection to this insurance being issued upon the lives of *syphilitics*.

(Comm. Proceedings p. 430) The Chairman, Mr. Cronyn:

> I think the value of this clause is in the fact that there is always a class of the community *who start out to beat any scheme*. We cannot see what possible devices may be resorted to for taking *undue advantage* of it.

Relative to proviso to Section 15, concerning medical examination, it is explained by Mr. Finlayson (Comm. Proceeding p. 387 and ecord p. 1730):—

> *By Mr. White:*
>
> Q. Would soldier applicants be subject to the same medical examination as ordinary applicants for insurance?—A. There is no medical examination in this insurance.
>
> *By Mr. Cooper:*
>
> What about a syphilitic case?—A. In most cases the man's medical history would show.
>
> Q. What is a *medical examination in effect?*—A. It is an examination of the medical history of the man. *To that extent*, it would be necessary for *an examination* to be made if a disability of *that nature* is believed to exist.

By Mr. Edwards:

Q. You say there is no *medical examination.*

The CHAIRMAN: I am afraid we are anticipating again. We shall reach that in Section 13 (changed to 15 in Act as sanctioned).

WITNESS: Section 12 simply provides for the methods of premium payment. He may pay either in single premiums or for life or what is known as ten-year, fifteen-year, or twenty-year payment life; or he may pay premiums until he reaches the age of sixty-five years. These are the ordinary standard life insurance contracts. They are found to be the most convenient for the average man.

By Mr. McNutt:

Q. What happens if he fails to pay the premium?—A. The policy lapses. Section 13. "No medical examination or other evidence of insurability shall be required in respect of any contract issued under this Act." I think that if *we imposed a medical examination, except for the purpose of enabling the Minister to decide in cases such as I have mentioned,* it would defeat the purpose of the Act. I do not see that there is any use in us devising a Government Insurance scheme for the benefit of those uninsurable and *then requiring them to pass a medical examination.*

On Page 483 Comm. Proceedings and Record p. 1732:

Mr. GRIESBACH: I am not a member of the Committee, but I am interested, and I would like to ask if the discussion now going on refers to the cases of soldiers who were, by reason of their services, rendered incapable of taking ordinary insurance, and if it embraces all such cases.

The CHAIRMAN: Yes, General, it does. We have had I think three days consideration of a Bill which has been suggested to that effect. We are considering it in executive session before reaching a conclusion.

Mr. CLARK: It emmbraces more than that, it embraces all soldiers whether disabled or not.

The CHAIRMAN: *Without medical examination,* without relation to their disability, the rate to be based on age.

On Page 488 Comm. Proceedings and Record p. 1732 Mr. Finlayson continues:

By Mr. Nesbitt:

Q. If he was disabled afterwards it would not affect his soldier policy?—A. No.

By Mr. McCurdy:

Q. Just following that suggestion of Mr. Murphy's, what work is planned for determining who shall be eligibles. Must a man have been refused by the insurance company?

Mr. NESBITT: No it is *open to all soldiers.*

Mr. MCCURDY: Before he is entitled to the insurance?

WITNESS: *The only condition is that he shall have* served, enlisted or been enrolled or drafted in service in the Canadian Naval, Military or Air Forces.

By Mr. McCurdy:

Q. Even if he never left Canada?—A. Even if he never left Canada, and even if he never left the farm or shop.

In its report to the House (page 15) the Committee says:

The Chief features of the Bill are:

1. Any returned soldier, sailor or nurse domiciled and resident in Canada, and in certain cases the widow of any returned soldier or sailor may insure with the Dominion of Canada to an amount of from $500 to $5,000.

2. This insurance will be granted *without medical examination* and will therefore be available *to all no matter what may be their condition of health.*

During the following debate in the House, Hansard of June 23rd, 1920 (Page 4054) and Record (p. 1742):—

Mr. McMaster: As no medical examination is required, is no one charged with the duty of seeing that the insured is not on the point of death?

Mr. Cronyn: The Bill would be of no avail to the disabled soldier *if there were to be a medical examination.* It mmust cover, as the Hon. Member has just said, the man on the point of death as well as the normal man. The only protection to the country in the case of a man who is so disabled that his life is short arises from the fact that, under the provisions of Section 10, if the insured's death is due to war service and his dependents are pensionable, they do not draw any benefit from the insurance policy, but they are entitled to a return of the premium with interest. If, however, his death is due to natural causes, his dependents get the benefit of the policy.

From the above it is made abundantly clear that, although by Sections 13 and 15 the Minister was given the absolute power to refuse any application for insurance or order any medical examination he saw fit, it was the understanding of the farmers of the Bill and of those who took active part in the discussion in connection with it, that this power was to be exercised only in cases of self-inflicted wounds, suspected immoral conduct or fraud, and that even death-bed applications were not to be debarred. The Act went much further than the Veterans' Resolution ever prayed for, in that the applicant without dependents was to be only exactly the same footing as the one with dependents, and in that it was not necessary to show that the physical condition of the applicant was in any way connected with service. This was offset by the insertion of a time limit shutting out applications after a period of two years.

By Order in Council P.C., 1968 of August 18th, 1920, the Pensions Board was entrusted with the administration of the Returned Soldiers' Insurance Act. The Board thus became the agents of the Minister of Finance and responsible for the preparation of contracts of insurance and the general policy under which contracts were issued, pursuant to the regulations of the Hon. the Minister of Finance. From the start Major C. B. Topp, D.S.O., M.C., was made the executive officer of the Pensions Board in connection with insurance matters.

By subsequent Orders in Council 1187 of April 12th and No. 2722 of August 17th,.1921, the administration of the Insurance Act was transferred to the Department of Soldiers' Civil Re-establishment, but it was provided that the Pensions Board should through the D.S.C.R. lay down the policy to be followed in the administration of the provisions of the Returned Soldiers' Insurance Act. The Department of Soldiers' Civil Re-establishment placed the Act under its Director of Administration continuing with Major C. B. Topp, in charge of the Returned Soldiers' Insurance Division, as active head for administrative purposes.

The evidence before this Commission shows that the Pension Board originally, and for over fifteen months thereafter, administered Sections 13 and 15 of the Act in accordance with the understanding mentioned above. The door

was wide open and applications for insurance, even so-called death-bed applications, were accepted without medical examination, so long as death did not occur before the usual time for delivery of the policy. The only restrictions were in cases of suspected fraud or impaired health resulting from immorality or self-inflicted wounds.

In the course of making know the advantages of the Act, representatives of the Pensions Board made public declarations at meetings of ex-service men, and literature was circulated emphasizing the fact that the Act was "for ex-members of the forces not in sufficiently good health to obtain insurance in the ordinary way" and that "medical examination is not required." This literature was in circulation and officially distributed up to as late as September. 1922. (Record p. 1058-1070, 1736, 1740 and 1770-1772).

The circumstances leading up to a change of policy whereby the physical condition of the applicant was to enter into the question of his right to insurance, are shown in the records of correspondence and interviews between the Minister of Finance and the officials administering the Act. Evidently cases had arisen where the applicant was in extremis when the application was made and had died before the policy was issued.

On December 15th, 1920, (Ex. 67 H.D.D. Record p. 1812) the Pensions Board proposed certain regulations, as set out in the following letter:—

OTTAWA, December 15th, 1920.

Hon. Sir HENRY DRAYTON, K.B.,
Minister of Finance,
Ottawa, Ont.

SIR,—I have the honour to refer to the question of whether death-bed applications for insurance shall be accepted, and to submit herewith for your consideration a form of procedure which has been agreed upon between this office and Mr. Finlayson, Superintendent of Insurance.

(1) Policies will come into force on delivery. This will be on the average, two weeks from date of receipt of the application at Ottawa.

(2) Should claims occur before delivery of the policy, special investigation will be made of circumstances. If delivery of the policy has been unduly delayed, or if, in the opinion of the Commissioners, there are other modifying circumstances, the claims may be admitted.

(3) In no case will a claim be admitted if a death occurs before the application has been examined and approved and so marked in the usual course by the Department.

It is recommended that this procedure should be applied to all claims that have heretofore occured, or that occur hereafter. Subject to your approval, it will be unnecessary to incorporate this procedure in an order in council as it can be put into effect as a detail or administration.

Yours faithfully,

(Sgd) C. B. TOPP,
for Chairman,
Board of Pension Commissioners for Canada.

These regulations were approved by the Minister on December 17th. 1920.

As will be seen the above regulations only affected the exceptional cases where there might have been, as a matter of law, no liability on account of the policy not having actually been delivered when death occurred, and contained no suggestion that there should be any right to refuse an application where the applicant was still living, no matter how ill he might be. The same subject of death-bed applications was dealt with, in a letter dated April 25th, 1921 (Rec

p. 1813 from Major Topp to Colonel Margeson for the Pensions Board, in which he refers to the procedure adopted as above and states it was only to apply in cases of fraud, and that the matter is being considered by the Parliamentary Committee then in Session, and that the opinion of the sub-Committee is understood to be that all claims should be admitted if the applicant had completed his application and paid his first premium, regardless of how quickly death might ensue.

On June 15th, 1921, (Record p. 1813) Major Topp wrote the Pensions Board thus:—

OTTAWA, June 15, 1921.

The Commissioners,
Returned Soldiers' Insurance,

RS1 4-3-11.

The following recommendation was made in respect of so-called death-bed applications by the Parliamentary Committee;

That regulations under the Act be framed to provide that the approval by the proper officer of an application for insurance and receipt of the initial premium due thereunder shall, in the absence of fraud, have the same effect as delivery of the policy to the assured. Cases already dealt with affected by such regulations to be reviewed.

The opinion of the Committee upon this subject was that in every case in which an individual had completed his application in the proper way, and had paid his premium, a claim should be admitted even if death occurred prior to the delivery of the policy. *It was, in the opinion of the Committee, a matter of considerable doubt whether the Government could legally refuse to admit a claim after having accepted the application and premium, even if the applicant was actually at the point of death when he signed his application. This opinion was based on the Section in the Act providing that no medical examination or other evidence of insurability shall be required.* The Committee was further of the opinion that the Act should be given the most generous possible interpretation when the beneficiary is a dependent of the insured, not eligible for pension, such for instance as the case of a widow married after the appearance of her husband's disability.

In view of the above considerations, it is recommended that in all cases where an applicant dies before the issue of his policy, but subsequent to receipt of application and payment of premium, the claim may be admitted if it is established that the beneficiary was dependent upon the applicant for support. It is further recommended that the following procedure be carried out in all other cases in which death occurs before the issue of the policy.

(1) Contracts will become effective in the absence of fraud upon the approval of the application by the responsible clerk. As a general rule this will be within two days of its receipt in Ottawa.

(2) In cases where application is made from a point more than three days distant from Ottawa, and death occurred before it has been approved the application shall be considered as having been approved in the usual course, if it is in order.

(3) In every case in which death occurs before the issue of the policy a special investigation will be made and a sworn statement from the medical attendant of the applicant setting forth his physical condi-

tion at the time of application will be required. *An application will be regarded as having been fraudulently made if it is shown that the applicant at the time of making application was languishing at the point of death.*

It is proposed to continue the present practice of withholding delivery of policies for fourteen days from date of application as it would strengthen the hand of the department in refusing to admit a claim should it be desirable to do so if the policy had not actually been delivered.

Submitted for your consideration.

(Sgd.) C. B. TOPP,
Head of Branch

CBT/M.

The principle laid down in the last sentence of paragraph (3) above was entirely new, and marks the first suggestion of the later policy requiring a certain standard of physical condition at the time the application was made. This suggestion would not only apply to the cases which were the subject of discussion, namely those in which death occurred before the issue of the policy, but would, if adopted, authorize the refusal of an application even though the applicant might live for many months. On June 23, 1921 (Record p. 1814), a suggestion was made in a memorandum from Dr. Arnold, Director of Medical Services, to Major Topp that the words "*had reason to belicve that he could not recover, and that death was imminent*" be substituted for "*was languishing at the point of death.*

There is no evidence that any action was taken on these proposed new regulations, and, as will appear, they were re-drafted and the revised regulations were submitted to the Minister on July 19, 1921.

Conferences between the Minister, the Pensions Board and Major Topp were held at different times, of which the only record appears in memoranda made by Major Topp and submitted as evidence before the Commission. Major Topp qualified these memoranda as being simply notes made by himself for future reference, outlining his personal impressions of what took place and his understanding of individual cases which he thought debatable, and not necessarily as stating the official view of the Pensions Board. The correctness of these notes was not questioned in any way by either of the parties to this investigation.

On July 19, 1921, one of these conferences took place between the Minister of Finance (Sir Henry Drayton), Colonel Thompson, Mr. Finlayson and Major Topp, in which the proposal was definitely made that medical examination or certificate should be required in certain cases. Major Topp's memorandum of this conference is as follows (Record p. 1815):—

"RS1 17-2-3.

July 19, 1921.

Death-bed applications.

A conference was held in connection with the marginally noted subject this afternoon, between Sir Henry Drayton, Col. Thompson, Mr. Finlayson and the undersigned. The *procedure next attached* was submitted to the Minister for consideration.

Col. Thompson made strong representations to the Minister to the effect that it was never the intention of the Government in passing the Insurance Act to accept applications for insurance from individuals languishing at the point of death. He felt that *a medical examination or certificate should be required* of every individual making application while in hospital or receiving medical treatment. If such examination or certificate disclosed the applicant as being in *imminent danger of death*

from some injury or disease *not attributable* to war service, he would *refuse* to accept the application. This view was opposed by Mr. Finlayson and the undersigned on the ground that it would *defeat the original intention of the scheme*, and that it would enormously increase the expense and difficulty of administration. Mr. Finlayson said that in originally considering the scheme the Government was *fully aware* of the fact that a number of individuals in serious physical condition from causes *other* than war service would be insured, and for this reason the *time* during which applications would be received was *limited*. It was also pointed out that it would be a very difficult matter for medical men to agree on what constituted 'imminent danger of death."

The Minister felt that some form of *medical examination would be desirable* to prevent individuals from *deliberately delaying application* until the point of death, but before giving a final decision he requested that valuations of policies issued up to date be prepared to show the condition of the Reserve Fund in its relation to the present high rate of mortality among policy holders. In the meantime death-bed claims would be dealt with under the procedure previously approved.

(Sgd.) C. B. Topp.

The procedure referred to in above memorandum follows (Record p. 1816):

In connection with the administration of the Returned Soldiers' Insurance Act, your attention is invited to the following recommendation in respect of so-called "death-bed" applications for insurance, made by the Select Committee of the House on pensions, insurance and re-establishment.

That regulations under the Act be framed to provide that the approval by the proper officer of an application for insurance and receipt of the initial premium due thereunder shall, in the absence of fraud, have the same effect as delivery of the policy to the assured. Cases already dealt with affected by such regulations to be reviewed.

This recommendation makes it necessary to alter the procedure for dealing with such cases approved by you in December, 1920, and it is suggested that it be cancelled and the following substituted therefor:

1. Policies will come into force upon approval of the application by the proper officer.

2. Applications will be approved, as a general rule, seven days after the date of receipt in Ottawa.

3. In every case in which death occurs after the approval of an application by the proper officer, but before the policy has been mailed, special investigation will be made if necessary and a sworn statement of the medical attendant of the applicant setting forth his physical condition at the time of his application will be returned.

4. Cases in which death occurs before the approval of an application by the proper officer, may be given special consideration. If the approval of the policy has been unduly delayed, or if, in the opinion of the Commissioners, there are other modifying circumstances, the claim may be admitted.

It is proposed to continue the present practice of mailing policies fourteen days from the date of receipt of application in order to permit of investigation, if necessary, in all cases where death occurs within a short time of making application.

The net result of this interview was that there were two matters discussed with the Minister:—

(*a*) The suggestion by Col. Thompson that medical examination should be required in certain cases; and

(*b*) The recommendation of the Parliamentary Committee to the effect that new regulations be framed which would provide that as soon as an application was approved it was to be in force, instead of the existing regulations that the policy was not in force until delivery, and that cases be reviewed in the light of the new policy.

Coupled with this recommendation of the Parliamentary Committee were the foregoing proposed new regulations, framed by the Pensions Board, purporting to carry the recommendation into effect. According to the memorandum the Minister withheld action both as to the suggested medical examination and as to the new regulations, giving instructions that a valuation be prepared of policies in force to date, and that the existing regulations (December 17, 1920) continue in the meantime.

Before the valuation of policies required by the Minister was completed, a number of cases came up in which payment of insurance was refused on account of death occurring so soon after application that it was impossible to issue the policy. Apparently (but there is not sufficient evidence to state positively) these cases were such that insurance would have been granted if the recommendation of the 1921 Parliamentary Committee had been carried out. This apears from a letter of October 11, 1921, (Record p. 1817) to the Pensions Board from Major Topp.

According to a further letter from Major Topp to the Pensions Board dated December 2, 1921, (Record p. 1818) the valuation of policies had been completed between October 11, and that date, and on account of the information thus received the Minister considered no further action necessary. The letter is as follows:—

RETURNED SOLDIERS' INSURANCE MEMORANDUM

To—the Commissioners,

From—the Returned Soldiers' Insurance,

OTTAWA, December 2, 1921.

17-2-3.

Death-bed Applications.

The Parliamentary Committee in its report to Parliament at the last session made the following recommendation:

That regulations under the Act be framed to provide that the approval by the proper officer of an application for insurance and receipt of the initial premium due thereunder shall, in the absence of fraud, have the same effect as delivery of the policy to the assured. Cases already dealt with affected by such regulations to be reviewed

On July 19, Col. Thompson, Mr. Finlayson and the writer met the Honourable, the Minister of Finance to discuss the proposed regulation. The Minister declined to give a ruling, pending the valuation of the Returned Soldiers' Insurance Fund, which he requested Mr. Finlayson to have prepared. In the meantime his instructions were that regulations originally approved should remain in force. These regulations provide for the admission of claims occurring after the approval of the application, but before delivery of the contract, only in the discretion of the

Commissioners. The Special Committee's report which was adopted by Parliament recommends the admission of all claims after approval of the application, whether the contract has been delivered or not.

The valuation requested by the Minister has been prepared and it has been submitted to him by Mr. Finlayson, who informed the writer, that Sir Henry does not consider any further action necessary, the present premium income being more than ample to meet claims occurring at the present rate. Mr. Finlayson's opinion is that there will be no deficit to be provided for on account of insurance for at least five years, and probably ten years, there being no reason to suppose that the rate of mortality in the future will exceed that experienced during the first year. The possibility is that it will be lower, since it is not unreasonable to suppose that the seriously impaired lives were among the first insured. He does not think that any further action in the direction of having a new regulation made is necessary.

As the matter stands at present no action whatever has been taken to give effect to the recommendation of Parliament, these cases still being dealt with in exactly the same manner as before the recommendation was made, and it is brought to the attention of the Commissioners, for any steps that they may deem necessary in the way of discussing the question with the Minister before the election.

(Sgd.) C. B. TOPP,
for Director of Administration.

CBT/M.

Compilation of December, 1921, records showed that death claims increased materially over November and that a considerable number of death-bed claims were from beneficiaries who were not actually dependents of the insured (Record p. 1780 et seq).

The Pensions Board felt that the situation was becoming very serious, and that the whole matter should be brought to the attention of the Hon. the Minister of Finance. It was pointed out that there were from 450,000 to 500,000 returned men eligible for insurance, and that, with the policy of administration then in force, there was nothing to prevent any one of these men from making application for insurance just a short time before death, so long as this application was within the time limit of the Act, then September 1, 1922. Further attention was called to the danger of exploitation of the scheme.

The Commission cannot see that the possibility of exploitation was any greater at this particular time than when the Act was passed.

On the 16th of January, 1922, a letter explaining the whole situation was sent by the Pensions Board to the new Minister of Finance, Honourable W. S. Fielding (Record p. 1819):—

January 16, 1922.

Hon. W. S. FIELDING, P.C.,
Minister of Finance,
Ottawa, Ont.

Dear Mr. FIELDING,—Under the Returned Soldiers' Act which has been in operation since September 1, 1920, all who served in the Canadian Forces, as well as those who served in the forces of the Imperial Government or of any of the allied or associated Powers, providing they were domiciled and resident in Canada prior to the war, are eligible to insure their lives with the Government in amounts of from $500 to $5,000, without medical examination.

Within a few weeks of the effective date of the Act the question arose as to whether application should be accepted from individuals who were virtually at the point of death, and claims paid when the policy had not been delivered, or had been in force only for a few days or weeks. The whole question was at that time placed before the then Minister of Finance, who approved the following procedure:

1. Policies will come into force on delivery. This will be, on the average two weeks from the date of receipt of the application at Ottawa.

2. Should claims occur before delivery of the policy special investigation will be made of circumstances. If delivery of policy has been unduly delayed or if, in the opinion of the Commissioners, there are other modifying circumstances, the claim may be admitted.

3. In no case will a claim be admitted if a death occurs before the application has been examined and approved, and so marked in the usual course by the department.

The point was again raised during the deliberations of the joint Special Pensions and Re-establishment Committee of the House in May last. The Committee felt that the regulations made by the Minister were too drastic and was of the opinion that all claims should be paid when the applicant died subsequent to the date of acceptance of the premium in Ottawa, and the approval of the application by the Department. The Committee's recommendation in this regard as contained in its final report was as follows:

That the regulations under the Act be framed to provide that the approval by the proper officer of an application for insurance and receipt of the initial premium due thereunder shall, in the absence of fraud, have the same effect as delivery of the policy to the assured. Cases already adjusted affected by such regulation to be reviewed.

Under instructions of the Minister no action was taken to give effect to this recommendation and the original regulations approved by him are still in operation. Up to date twenty-eight applicants have died before deliveries of the policies and nineteen of the resulting claims have been rejected, six being paid under the discretionary clause of the regulations mentioned. In two cases pension was awarded to the beneficiaries and insurance in these circumstances is not payable.

Up to date some 7,980 policies have been issued, the insurance value being $18,720,500. The total number of death claims admitted is 174, the net liability thereon being $375,000. According to a valuation prepared by the Dominion Actuary, the ultimate total loss on business written during the first year of operation of the Act will be about $2,000,000, the net rate of mortality experienced being five times the tabular rate. Owing to the annuity method of payment the premiums income has, however, been ample to meet all claims so far and it is estimated that there will be no actual deficit on account of this insurance for from five to ten years at least. The premium income is at present nearly $400,000 per annum, and before the closing date, viz: September 1, 1922, it is estimated that it will be in the neighbourhood of $1,000,000 per annum.

The Mortality rate continues to be excessive, eighteen claims of an insurance value of $59,000 having occurred during November and twenty-two claims of an insurance value of $77,500 in December. Policies in these cases had been in force only for a few months and in some instances beneficiaries are brothers or sisters not in any way dependent upon the insured, or having any legitimate claim upon him. The Commissioners feel that as its very liberal nature becomes better known there is a danger

of exploitation of the scheme by such persons and that the time has arrived for rejection of applications made by individuals who are in imminent danger of death. The Minister has power under Section 13 of the Act, to refuse to insure any individual if, in his opinion, there are sufficient reasons for so doing. *The practice has been inaugurated therefore, of demanding a medical examination*, or a statement of the applicant's condition signed by his Physician, when it appears that he is confined to a Hospital or to his home suffering from some serious illness. If medical evidence so obtained indicates that the applicant's expectancy of life is brief the application is *rejected*.

The above is submitted for your consideration and for instructions as to the procedure to be followed when death occurs before delivery of the policy, and also as to whether the Commissioners shall continue to demand medical evidence of insurability in cases where this is deemed advisable.

Yours faithfully,
(Sgd.) JOHN THOMPSON,
Chairman Board of Pension Commissioners for Canada.

The salient points in the letter are:—

(*a*) The statement that the Act provided for insurance without medical examination, which in effect meant that the state of health of the applicant was not material.

(*b*) The statement that the 1921 Committee considered the regulations of December 17th, 1920, (Which allowed fourteen days before the insurance was in force) were too drastic and that policies were to be in force so long as death did not occur before approval of the application, thus admitting certain death-bed claims which would have been rejected under the 1920 regulations.

(*c*) The excessive mortality rate and the danger of exploitation as the benefits of the Act became better known.

(*d*) The opinion of the Board that the time has arrived for rejection of death-bed applications.

(*e*) That a practice had been inaugurated of demanding medical examination or medical certificate in respect of applicants seriously ill.

(*f*) That if medical examination indicated that the applicant's expectancy of life was brief the application was rejected.

As to (*e*) (the practice of demanding medical examination) there is no evidence of any authority from the Minister of Finance for the inauguration of this practice. The last definite instructions of the Minister had been to continue the practice laid down in the regulations of December 17th, 1920, and that no further action as to the suggested new regulations was necessary. (See letter Major Topp to the Pensions Board, December 2nd, 1921.)

Up to this time all that had been done by the Pensions Board was to make representations that death-bed applications ought to be rejected. This letter is the first evidence of the fact that the Pensions Board of its own motion had actually adopted the policy of demanding a medical examination or certificate and there are in evidence two actual instances in which this was done, both of these cases being before February 15th, 1922, and both of them having dependents (Record p. 1882, 1885.)

As to (*f*) (the rejection of those with a brief expectancy of life), although it is definitely stated that the application "is rejected" Major Topp explained that what was really done was to refuse to accept the application in what they considered were death-bed cases and to submit these to the Minister with the opinion

that they were not to be insured (Record p. 1820-2, 1831-4). He further stated that although the wording of the letter would indicate that his practice was actually being followed at the time the letter (January 15th, 1922) was written, there were no applications so dealt with until about the end of January or early in February (Record p. 1787).

There appears to have been an interview between Col. Thompson and the Minister on February 18th, 1922. (See memo Major Topp, dated February 20th, 1922, Record p. 1824) and another on February 22nd, 1922, and a memo made by Major Topp dated February 23rd states the information which he had received from Col. Thompson as to the result of the conference. This memorandum is as follows (Record p. 1828):—

RS1 17-2-3

OTTAWA, February 23rd, 1922.

Death-bed applications.—I was advised by Col. Thompson this morning that he had again seen the Hon. Mr. Fielding in connection with the marginally noted subject, last evening. The Minister's decision after discussing the whole question very thoroughly with Mr. Finlayson and Col. Thompson was as follows:

(1) When an applicant is seriously ill from some cause other than war service application will not be accepted.

(2) When an applicant is seriously ill as a direct result of war service, is unmarried, and has no one actually dependent upon him application will not be accepted.

(3) When the illness is due to service and actual dependency exists, application will be accepted without reference to the man's physical condition.

It is the intention of the Minister to confirm this decision in writing when he returns to Ottawa in about a week's time. Meanwhile the Board will deal with the applications as above indicated.

(sgd.) C. B. TOPP,
for Director of Administration.

Major Topp was not present at the interview and no evidence was given at first hand as to what took place there, but as will be seen on reading the Minister's letter of March 15, 1922, his written decision in connection with the matter was materially less restrictive than that stated in the memorandum. If the policy indicated in the memorandum had been adopted it would in effect have been authority from February 22nd to March 15th, 1922, for the practice stated in the letter of January 15th, 1922, of refusing death-bed applications except those whose illness was due to service and who had dependents. According to the evidence the Pensions Board never rejected applications of the latter type except in one special instance (Record p. 1883.)

Meantime conferences were taking place, and memoranda exchanged between Major Topp and Mr. Finlayson containing various suggestions as to the principles to be laid down, and further information was being prepared for the Minister. (See letter between Major Topp and Mr. Finlayson, March 8th and 10th, 1922, Record p. 1835 and 1836). On March 15th, 1922, the Minister wrote Col. Thompson definitely setting out his conclusions for the guidance of the Pensions Board. The letter is as follows (Record p. 1758):—

MINISTER OF FINANCE, CANADA

OTTAWA, March 15th, 1922.

DEAR COL. THOMPSON:

The Returned Soldiers' Act provides in Section 13:

> The Minister may refuse to enter into an insurance contract in any case where there are in his opinion sufficient grounds for his refusing.

In several instances your Board has declined to accept applications of soldiers whose health is seriously impaired and such cases have been referred to the Minister of Finance for his consideration.

I think it is not desirable that this power of the Minister of Finance to overrule the decision of your Board should be often exercised. It seems to me that it is better that we should have a clear understanding as to the principles which should govern the applications of returned soldiers, and that these should be applied by your Board without reference to the Minister of Finance, unless there are exceptional circumstances which call for a review of the case by him.

Having regard to the obvious intention of the Act which is to enable those soldiers who became uninsurable by reason of the duties imposed upon them by their military service to provide by means of insurance policies, for the maintenance, after their death, of those dependent upon them, it would appear to be undesirable to insure persons whose disability has been caused by their own immoral actions or persons who have no dependents within the class specified in the Act and whose disability is of such a nature that they can be said to have no expectation of life.

I would therefore suggest that the Board refuse to accept an application for insurance from any applicant in impaired health in any case in which it is established,—

> (*a*) that the applicant's impairment is due in whole or part to his own immoral conduct; or
>
> (*b*) that the applicant has no dependents within the classes mentioned in Section 4 of the Act and that his impairment is of such a serious nature that he can be said to have no expectation of life.

Yours faithfully,

(Sgd.) W. S. FIELDING.

Colonel JOHN THOMPSON,
Chairman of the Board of Pension Commissioners, Ottawa.

Paragraph (*a*) of the above regulations simply reiterated what had always been the intention, as shown in the discussion in the Committee and in Parliament at the time the Act was passed, viz: to refuse applications in cases of immorality; but paragraph (*b*) constituted the first written authority to the Pensions Board for refusing insurance on account of the physical condition of the applicant and only affected the case of the man who applied for insurance when he had no expectation of life and who had no dependents within the class of wife, husband, child, grandchild, parent, brother or sister.

The Minister's reference to the obvious intention of the Act as being for the benefit of the dependents, while in line with what has been asked for by returned men did not include, as has been seen, all of whom benefits of the Act has been extended.

The letter of the Minister was answered by Col. Thompson on March 21st, 1922, as follows (Record p. 1760):—

RS1 17-2-3.

March 21st, 1922.

The Honourable W. S. FIELDING,
Minister of Finance,
Ottawa, Ont.

Dear Mr. FIELDING,—I am in receipt of your letter of March 15th containing instructions for the guidance of the Board in dealing with applications for insurance under the Returned Soldiers' Insurance Act.

The Board is fully in accord with your view that it is better that we should have a clear understanding as to the principles which should govern this matter, and that these should be applied without reference to the Minister of Finance, except in exceptional circumstances which call for the review of the case by him personally. The Board is further of the opinion that its interpretation of your instructions should be submitted for your approval in order that it may be in complete agreement with you upon this point. The following is therefore submitted for your consideration:

1. That the term "dependent" as used in your letter shall mean actual dependency for support.

2. That the phrase "no expectation of life" shall mean cases where the applicant is hopelessly ill, such for example a man with tuberculosis or cancer in such an advanced stage that it is certain to cause his death. and will probably do so within a short period.

3. That Section (*b*) of your instructions shall be read with the obvious intention of the Act in view, as set forth in the first paragraph of page two of your letter and shall be interpreted to me that applications shall not be accepted from persons having no expectation of life as a result of impairment from causes other than military service, even though they have dependents within the classes mentioned in the Statute.

Enclosed herewith are several examples of applications received from returned soldiers who are seriously ill with disease not in any way attributable to, or aggravated by, military service, but who have dependents. Cases of this nature do not appear to be clearly covered by your instructions but the Board is of the opinion that such applications should be rejected.

If the Board's interpretation of the above points is correct might it be confirmed, please?

Yours very truly,
(Initialled) J. T.,
Chairman Board of Pensions Commissioners.

The reference in the Minister's letter to the "obvious intention of the Act" was thus taken by the Pensions Board as warranting much more far reaching restrictions than the Minister had specified. Not only were applications from those "with no expectation of life" and *without* actual dependents refused, but it was interpreted to mean that even those *with* dependents "having no expectation of life as a result of impairment from causes other than military service" should be equally debarred.

The Minister evidently felt that he could not go this far in exercising the powers conferred upon him by Sections 13 and 15 of the Act and suggested that, as a Committee of the House had just been appointed to consider returned

soldiers' interests, it would be better to await the Committee's action than to lay down any rigid rule, the whole as appears in his letter of March 30, 1922, to Col. Thompson (Record P. 1764):—

MINISTER OF FINANCE, CANADA,

OTTAWA, March 30, 1922.

DEAR COLONEL THOMPSON,—Referring to your letter of the 21st inst., on the subject of Returned Soldiers' Insurance, it occurs to me that since a Committee has just been appointed to consider the whole question of returned soldiers' interests it will be better for us to await the Committee's action than to lay down at this moment any rigid rule. I suggest, therefore, that in any cases which seem to your Board to be doubtful the matter be reserved and that no further action be taken until the Committee have had an opportunity of investigating.

No doubt the members of your Commission will be asked to assist the Committee in their deliberations and the same may be said of the Superintendent of Insurance.

Yours faithfully,

(Sgd.) W. S. FIELDING,

COL. JOHN THOMPSON,
Chairman, Board of Pension Commissioners,
Ottawa, Ontario.

It is not specifically stated in this letter that the Minister intended that the limited restrictions contained in his letter of March 15 should be held in abeyance pending the Committee's action, but it is apparent that it was intended that no further rules should be laid down respecting the classes under consideration.

As appears from the proceedings of the 1922 Committee (See Committee Proceedings, p. 369), a memorandum was prepared by the Pensions Board under date of April 24, 1922, setting out specifically the procedure which was then being followed (Record p. 1793).

The memorandum was as follows:—

MEMORANDUM OF VARIOUS TYPES OF APPLICATIONS AND COMMENTS THEREON BY THE BOARD APRIL 24, 1922

NOTE.—(*a*) Beneficiaries under the Act are wife, husband, parents (including grandparents and step-parents of either the insured or his wife), child (including adopted child, step-child, grand-child and illegitimate child, if maintained), brother and sister (including half-brother and half-sister).

(*b*) Dependents referred to below mean potential beneficiaries actually dependent upon the insured for support.

CLASS 1—APPLICANTS WHO ARE NOT SERIOUSLY ILL

(*a*) An applicant with dependents, ill with a pensionable disability.
Application is at present accepted.

(*b*) An applicant without dependents, who is ill with a pensionable disability.
Application is at present accepted.

(*c*) An applicant with dependents, ill with a disability that is not pensionable.

Application is at present accepted.

(*d*) An applicant without dependents, ill with a disability that is not pensionable.

Application is at present accepted.

Class 2—Applicants Who Are Seriously Ill

(*a*) An applicant with dependents, seriously ill with a pensionable disability.

Application is at present accepted.

(*b*) An applicant with dependents, dangerously ill with a disability that is not pensionable.

Application is at present refused.

(*c*) An applicant without dependents, seriously ill with a pensionable disability.

Application is at present refused.

(*d*) An applicant without dependents, seriously ill with a disability that is not pensionable.

Application is at present refused.

Class 3—Applications from Persons in so Serious a Condition of Health That They Have No Reasonable Expectation of Life

(*a*) An applicant with dependents so seriously ill with a pensionable disability that he has no expectancy of life.

Applications are at present accepted, and insurance paid, provided death does not occur before approval of the application for issue of the policy.

(*b*) An applicant without dependents so seriously ill from a pensionable disability that he has no expectancy of life.

Applications are at present refused.

(*c*) An applicant with dependents so seriously ill from a disability that is not pensionable that he has no expectancy of life.

Applications are at present refused.

(*d*) An applicant without dependents, so seriously ill from a disability that is not pensionable that he has no expectancy of life.

Applications are at present refused.

CLASS 4—GENERAL

(*a*) The above is the general procedure of the Board. In cases, however, where an applicant with or without dependents is seriously ill with an injury or disease attributable to service or otherwise, and has been ill for many months with a disease which is certain to terminate fatally within a reasonably short time and has postponed taking out insurance until death is practically imminent.

Applications are at present refused.

(*b*) In cases where an applicant with, or without dependents, whose health has become impaired as a result of immoral conduct prior to enlistment, during service, or after discharge.

Applications are at present refused.

It will be noted that the whole scheme of the memorandum was to divide applicants who were in impaired health into three specific and one general classes according to their state of health; this obviously involved some medical examination. These classes were then sub-divided according to whether or not the applicant had actual dependents and whether or not the disability was a pensionable one, *i.e.*, related to service.

An attempt to sum up a ruling of this kind is always dangerous, but it can be said generally that those who were "seriously ill" at the time of application, even though it could not be said that they had no reasonable expectation of life, would be refused insurance unless they could show *both* that they had *actual dependents* and that their illness was from a *pensionable disability*. It of course followed, and was so laid down, that insurance would be refused to those in a more grave condition of health, namely, having no expectation of life, unless they could comply with the same conditions. Applications from those who were in impaired health, but who were not seriously ill, were accepted regardless of the causation of their illness or of the absence of actual dependents.

This procedure had not been previously put in writing in that form until the matter was submitted to the Parliamentary Committee of 1922, and the memorandum was simply a "crystallization" of the Board's opinion for the information of the Committee. The Board had acted on these lines generally speaking in dealing with applications (Record p. 1787).

To sum up the situation at the time the memorandum was presented, the Pensions Board had the Minister's authority of March 15, 1922, to reject applications where the illness was due to immoral conduct or where a man without dependents was so ill as to have no expectation of life. The Pensions Board also had the Minister's authority of March 30, 1922, that pending investigation by the Parliamentary Committee no further action be taken in cases which seemed to the Board to be doubtful. The Pensions Board in deciding what cases were doubtful adopted the principle afterwards crystallized in the memorandum.

The correspondence and the interviews already referred to show that the cases which had been thought of as desirable to refuse can be comprehensibly described as those in which the applicant was on his death bed. But this memorandum of April 24, indicated that a new restriction was being applied, by including not only death-bed cases, but those where the applicants were only "seriously ill".

The term "seriously ill" was used in the memorandum of February 23, referring to the interview with the Minister, but in the latter's written opinion of March 15, 1922, this term is distinctly qualified by the requirement that the illness must be so serious that it can be said that the applicant has no expectation of life. In the letter of the Pensions Board of March 21, 1922, the term "no expectation of life" is suggested to mean "hopelessly ill, as a man with tuberculosis or cancer in such an advanced stage that it was certain to cause his death and will probably do so within a short period".

The memorandum of April 24, 1922, shows that the practice followed by the Pensions Board was to extend the disqualification not only to those hopelessly ill with a fatal disease in an advanced stage, but to less hazardous risks, namely, those who were seriously ill.

The effect of this practice, as it finally emerged from the circumstances detailed, was to impose consideration of three separate factors:—

(*a*) State of health;
(*b*) Actual dependency of beneficiaries;
(*c*) Relation of illness to service.

Applications coming within the prohibition of the above memorandum continued to be dealt with by the Pensions Board, and it now appears (Record p. 1771 and 1776, 1922 Parl. Comm. p. 370) that up to August, 1922, out of 17,000 applications, 76 were rejected on account of the applicant being seriously ill and without dependents. In addition to these, the Commission is informed by Major Topp that there were 19 applications from men who were seriously ill but not from a pensionable disability, and who had dependents, and that approval of these applications was withheld pending the action of the Parliamentary Committee.

The Parliamentary Committee of 1922, under the chairmanship of Mr. H. M. Marler M.P., sat from April 4 to June 17 and considered, among other matters, amendments to the Returned Soldiers' Insurance Act. The memorandum of April 24, 1922, was forwarded to Mr. Marler, under covering letter from Col. Thompson (Record p. 1796), which urged early consideration of the matter "for the guidance of the Minister of Finance to enable him to formulate regulations for the guidance" of the Pensions Board.

The memorandum was evidently considered by a Sub-Committee, some of the members of which were apparently under the impression that this memorandum contained the regulations which had been in effect since the Act was put into force (1922 Committee Proceedings p. 370).

The procedure contained in the memoraum was eventually approved by the sub-committee and reported up to the main Committee which had passed it for incorporation with its report (Committee Proceedings p. 369).

In the meantime while this procedure of rejecting and withholding applications had been going on, the G.W.V.A. while being aware as a result of complaints in individual cases that a change of policy was apparently taking place, was not cognizant of the reason for the change or the circumstances under which these decisions were being made. The only information it had was the literature and declarations made by the Pensions Board to the effect that no medical examination was required and that the Act itself made no requirements as to beneficiaries having to be actual dependents of the insured, nor that the right to insurance of an ex-service man in impaired health might depend on whether his illness was due to service.

Mr. MacNeil says (Record p. 1748):—

> During the latter part of 1921 and the beginning of 1922 it was brought to our attention that applications for insurance had been made and rejected, the reason given being that the man's expectation of life was so short.

See also Record page 59 where Mr. MacNeil speaks of the evidence given before the Parliamentary Committee of 1922 in which:—

> Col. Thompson and Major Topp made statements . . . . . which revealed a distinct change of policy with regard to the Returned Soldiers' Insurance Act.

And also Record page 60 referring to the evidence given before the sub-committee on insurance in which:—

> A number of individual cases were brought. . . . . it was again revealed to us that a large number of applications for insurance had been rejected for reasons which had never before been considered. This was on the statement of Major Topp, Chief of the Insurance Branch.

Major Topp states that the memorandum:—

> Simply represented a crystallization of the Board's opinion for the information of the Parliamentary Committee. The Board had acted along those lines, generally speaking, but the regulations actually did not materialize—they were not put down in writing in that form until the case was submitted to the Parliamentary Committee under the Minister's instructions.

Mr. MacNeil's evidence is to the effect that all he learned was that additional qualifications were being required in individual cases, and that he was unaware that anything as definite as this memorandum, laying down definite principles, had been prepared and was being considered. (Record p. 60).

This memorandum did not come to the attention of the G.W.V.A. until it was read by the Chairman of the Parliamentary Committee at a meeting of the Committee on the evening of June 16, 1922 (Record p. 1791), and this memorandum is relied on by the G.W.V.A. as definite evidence in support of its contention that secret regulations respecting insurance had been made (1922 Committee Proceedings page 425).

Meantime, the cumulation of this and other matters referred to in this report had led to the dispatch of the telegram, the subject of this investigation. The report of the Parliamentary Committee had been practically completed when Mr. MacNeil was recalled by the Committee on the evening of June 16, and given an opportunity to go into the matters referred to in the telegram. The whole matter of what had been the original intention of the Act was gone into and Mr. MacNeil maintained his position that the benefits of the Act, so long as it was in force, was not to be denied to any ex-service man, regardless of the physical condition, the relation of impaired physical condition to war service or, the existence of dependents. He quoted records of the discussions at the time the Act was passed, and referred to at least some of its subsequent history, dealt with more fully in this report, Major Topp and Col. Thompson gave evidence as to the circumstances under which the change of policy had been inaugurated.

The Committee in its final report recommended the adoption, with two exceptions, of the procedure set out in the memorandum of April 24, 1922, as a schedule to the Act. The exceptions were first, that the Committee did not adopt the definition of "dependents" (in Note (*b*)) as a meaning "actually dependent on the insured for support ", but simply left the word to be construed according to the usual rules of interpretation, and the other exception was that the procedure set out under Class 4 (*a*) was not adopted which authorized depriving a man of insurance who had been ill for many months with a disease which was certain to terminate fatally within a reasonably short time, and who had postponed taking insurance until death was practically imminent.

In Parliament the schedule submitted by the Committee was incorporated in the Act, but a proviso was inserted which permitted those with dependents to insure up to January 1, 1923, regardless of the imminence of death or the

cause of their illness. The amending Section 12-13 Geo. V., C42, Sec. 2 is as follows:—

2. In the exercise of the powers conferred upon the Minister by Section thirteen and fifteen of the said Act the Minister shall be governed by the provisions of the Schedule to this Act. Provided that applicants with or without pensionable disability who are so seriously ill that they have no expectancy of life and who have dependents who are entitled to become beneficiaries under the contract as provided under the Act, shall be insurable under the Returned Soldiers' Insurance Act up to and inclusive of January 1, 1923.

The Schedule is as follows:—

SCHEDULE

CLASS 1—APPLICANTS WHO ARE NOT SERIOUSLY ILL

(*a*) An applicant with dependents, ill with a pensionable disability.
Application is to be accepted.

(*b*) An applicant without dependents, who is ill with a pensionable disability.
Application is to be accepted.

(*c*) An applicant with dependents, ill with a disability that is not pensionable.
Application is to be accepted.

(*d*) An applicant without dependents, ill with a disability that is not pensionable.
Application is to be accepted.

CLASS 2—APPLICANTS WHO ARE SERIOUSLY ILL

(*a*) An applicant with dependents, seriously ill with a pensionable disability.
Application to be accepted.

(*b*) An applicant with dependents, dangerously ill with a disability that is not pensionable.
Application to be refused.

(*c*) An applicant without dependents, seriously ill with a pensionable disability.
Application to be refused.

(*d*) An applicant without dependents, seriously ill with a disability that is not pensionable.
Application to be refused.

CLASS 3—APPLICATION FROM PERSONS IN SO SERIOUS A CONDITION OF HEALTH THAT THEY HAVE NO REASONABLE EXPECTATION OF LIFE

(*a*) An applicant with dependents, so seriously ill with a pensionable disability that he has no expectancy of life.
Applications are to be accepted and insurance paid, provided death does not occur before approval of the application for issue of the policy.

(*b*) An applicant without dependents so seriously ill from a pensionable disability that he has no expectancy of life.
Applications are to be refused.

(*c*) An applicant with dependents, so seriously ill from a disability that is not pensionable that he has no expectancy of life.
Applications are to be refused.

(*d*) An applicant without dependents, so seriously ill from a disability that is not pensionable that he has no expectancy of life.
Applications are to be refused.

CLASS 4—GENERAL

In cases where an applicant, with or without dependents, whose health has become impaired as a result of immoral conduct, prior to enlistment, during service or after discharge.
Applications are to be refused.

It will thus be seen that so far as the Statute itself was concerned, the 1922 amendment did not increase but definitely restricted the right of the Minister to refuse applications under Sections 13 and 15, by specifically directing him how to be governed in all circumstances after July 1st, 1922. The class with dependents was to be given special, definite consideration for six months, and after that the schedule was to apply in its entirety.

After July 1st, 1922, in accordance with the principles laid down in the proviso to the amending Section, the Pensions Board reviewed applications, approval of which had previously been refused, and in all cases where the applicant was still living and where he had dependents, insurance was granted. Nothing was done respecting the 76 rejected applications of applicants without dependents. There also remained seven applications from men with dependents which had either been rejected or approval of which had been withheld. These seven men had died in the meantime. These seven cases were referred to in the following letter of July 31st, 1922, from Major Topp to the Pensions Board (Record p. 1766):—

(To B.P.C.)

July 21st, 1922.

In his letter of March 15th the Honourable Mr. Fielding instructed that the Board should refuse to insure applicants in the following classes:—

(*a*) No dependents and so seriously ill as to have no expectation of life;

(*b*) Cases where disability is due in whole or in part to immoral conduct.

The Board replied that there were a number of cases apparently not covered by the Minister's instructions, and suggested that the letter be interpreted to cover these. Mr. Fielding then replied that he felt that it would be wise to make no rigid rule in this regard until the Parliamentary Committee had made its report and that doubtful cases be held pending this.

From above it is inferred that all cases not definitely within the classes covered by the Minister's original letter should be reviewed under the amended Act. The Board has already reviewed these, with the exception of cases where the applicant has died since the application was rejected.

Of sixteen cases where death has occurred before insurance was granted, seven of the applicants were married and two were single with dependents. Of this number one married man and one single man, with dependents, died before the application was received, and can therefore be eliminated. This leaves only *seven cases* for further consideration. The Board has definitely rejected claims in five cases and in the other two the decision "not to be accepted unless the Minister otherwise directs" was given.

If any of these cases are cited before the Royal Commission, and one or more of them is certain to be, it would be difficult for the Board to produce authority for its action in rejecting them.

Submitted for your consideration,

(Sgd.) C. B. TOPP.

After conference between the Minister and Col. Thompson the decision as to these seven cases was that, there being then no one with whom a contract could be made, no further action could be taken on these applications.

This appears from the following letter (Record p. 1778): —

MINISTER OF FINANCE, CANADA,

OTTAWA, July 28, 1922.

DEAR COLONEL THOMPSON,—Referring to our conversation of yesterday and to the memorandum you then handed me concerning cases of applicants for soldiers' insurance whose applications were not accepted, and who died before the Parliamentary Committee had submitted its report, I concur in the opinion expressed by you on behalf of the Pensions Board that no further action should be taken on these applications.

Your faithfully,

(Sgd.) W. S. FIELDING,

Minister of Finance.

COLONEL JOHN THOMPSON,

Chairman, Board of Pension Commissioners,

Ottawa.

RECAPITULATION *Re* INSURANCE

(*a*) In 1919 and 1920 the Veterans' Associations asked for legislation to provide insurance for ex-service men who, by reason of disability incurred while in service, were unable to procure insurance at standard rates for the benefit of their dependents.

(*b*) By the Returned Soldiers' Insurance Act, 1920, the Minister of Finance was authorized to make contracts of insurance with ex-service men for the benefit of relatives in the classes specified or for the benefit of the future wife of the soldier. It was not necessary that the beneficiaries should be actually dependent upon the insured, nor that any impairment of health from which he suffered should have relation to service, and further it was expressly set out that no medical examination or other evidence of insurability was required. Provision was made, however, that the Minister might refuse any application and that for the purpose of information in exercising this power the Minister might require medical examination; but it was specifically laid down in the discussion before the Special Committee and in the House, and it was understood that this power of the Minister to refuse applications was to be exercised only in cases of self-inflicted injuries, immoral conduct, or fraud, and that even death-bed applications were not to be debarred.

The apparent reason for the wide open character of the Act was that it had to be taken advantage of within two years from September 1, 1920.

(*c*) By Order in Council of August 18, 1920, the administration of the Act was vested in the Pensions Board. In 1921 administrative matters were transferred to the D.S.C.R. but the Pensions Board continued to lay down the policy. Major C. B. Topp was the executive head in connection with insurance matters.

(*d*) The Pensions Board carried out the policy in accordance with the understanding above set out, from the inception of the Act until nearly the end of 1921. Wide circulation was given to the feature of the Act that it was for ex-service men in impaired health and that medical examination was not required. No restriction was suggested requiring that beneficiaries had to be dependent on the insured, nor that the impaired health had to be related to service.

(*e*) On December 15, 1920, the Minister approved regulations providing in effect that policies would be in force on delivery, which would usually be two weeks from the receipt of the application, and that undue delay in delivery would be the subject of special investigation.

(*f*) In May, 1921, the Parliamentary Committee discussed death-bed applications where insurance was refused because the applicant died after the application was received, but before the policy was delivered. The interval between receipt and delivery averaged two weeks. The Committee considered this too drastic and recommended regulations by which, in the absence of fraud, the policy would be in force, as soon as the application was approved. The period required for this approval was about seven days. Cases already dealt with, affected by such regulations, were to be reviewed. Parliament adopted both recommendations.

(*g*) On June 15, 1921, Major Topp wrote the Pensions Board quoting these recommendations and enclosing suggested regulations pursuant thereto. These regulations contained also a proposed ruling that applications would be regarded as fraudulent if made when the applicant was languishing at the point of death. This introduced a new condition for insurability, namely, the state of health of the applicant. Apparently no action was then taken on these regulations.

(*h*) On July 19, 1921, the Pensions Board submitted to the Minister regulations in a new form purporting to be based on the Parliamentary recommendations. The Pensions Board strongly urged that it was not the intention of the Act to insure persons on their death bed, and that medical examination should be required of applicants who were ill, and that death-bed applications of those whose illness was not due to service should be rejected. Major Topp and the Superintendent of Insurance opposed this view and urged that it would defeat the original intention of the Act. The Superintendent of Insurance pointed out that in originally considering the scheme it was contemplated that men seriously ill from causes other than war service would be insured and that for this reason a time limit was imposed. No action was taken pending preparation of a valuation of existing policies. Death-bed applications to be dealt with as theretofore.

(*i*) Before October 11th, 1921, cases came up in which payment of insurance was refused and which Major Topp considered should be reviewed under the Parliamentary recommendation of 1921.

(*j*) On December 2nd, 1921, Major Topp wrote the Pensions Board giving the result of an interview which Mr. Finlayson reported having had with the Minister, to the effect that the Minister on receiving the valuation of policies had decided that no action was necessary, and consequently the procedure in force since December 17th, 1920, would continue. There was, therefore, as yet no adoption by the Minister of the principle of medical examination.

(*k*) On January 16th, 1922, the Pensions Board wrote the Minister referring to the 1921 Parliamentary Committee recommendation to the effect that policies should be in force as soon as the application was approved, on which recommendation no action had been taken. It referred to the excessive mortality rate and stated that the practice had been inaugurated of requiring medical examination and rejecting the application if the expectancy of life was found to be brief; instructions were requested as to procedure when death occurred before delivery of the policy, and as to whether the Pensions Board should continue to demand Medical evidence of insurability.

(*l*) While the letter indicates that the practice of demanding medical examination or rejecting applications was then in force, the actual cases produced in evidence in which the practice was applied were all after the date of the letter. It is stated that the rejection consisted in refusing to accept the application and submitting it to the Minister with the recommendation that the insurance be refused.

(*m*) A memorandum made by Major Topp, dated February 23rd, 1922, gives the result of the two interviews which Col. Thompson reported having had with the Minister on February 18th and 22nd to the effect that the Minister had given verbal decision which would for the first time have been authority, in future, for the practice which was already in force. The Minister's decision was to be confirmed in writing.

(*n*) Following further conferences and discussions the Minister on March 15th, 1922, embodied his decision in a letter to the Pensions Board confining the refusal of insurance in death-bed cases to applicants who had neither expectation of life nor dependents, thus not affecting the applicant with dependents.

(*o*) On March 21st, 1922, the Pensions Board wrote the Minister stating that its interpretation of his decision was that "dependent" should mean *actually dependent* for support, and that a man would be said to have no expectation of life if he were hopelessly ill and would probably die within a short period. It further extended its interpretation of the Minister's letter as meaning that even those *with dependents* would be refused insurance if there was no expectation of life, and if the illness was not due to service. Confirmation by the Minister of this interpretation was requested.

(*p*) On March 30th, 1922, the Minister replied, declining to lay down any rigid rule, and suggested reserving doubtful cases and taking no further action pending investigation by the Special Parliamentary Committee.

(*q*) The action of the Pensions Board took two different forms:

(1) Before the Minister's letter of March 15th, 1922, it refused acceptance of certain applications and submitted them to the Minister and recommended refusal; and

(2) After the Minister's letter of March 30th it treated certain cases as doubtful, and refused the application pending the investigation of the Parliamentary Committee.

In determining what cases should be disposed of in these two ways the Pensions Board developed a well defined procedure. Under this procedure even a man seriously ill, as well as a man with no expectation of life, was not accepted for insurance so far as the Pensions Board was concerned, unless he could show both that the proposed beneficiaries were actually dependent on him for support and that his illness was due to service.

This procedure was crystallized in a memorandum dated April 24th, 1922, which was submitted to the Parliamentary Committee. The memorandum states definitely that those applications "are at present refused."

(*r*) Before the inauguration of the changes of policy no steps were taken to notify, in advance or at all, ex-service men generally, or their organizations.

of the withdrawal of the benefits which had theretofore been granted to them, and widely advertised.

(*s*) From individual complaints to the G.W.V.A. it became apparent to it that additional qualifications for insurability were being required; but it was unaware of the principles on which the change of policy was based, and of the extent to which it was being applied.

(*t*) This obvious change of policy which the G.W.V.A. considered unwarranted, with other matters, precipitated the telegram of June 15, 1922, under investigation.

(*u*) On June 16, 1922, during the session of the Parliamentary Committee, at which the telegram was discussed, the G.W.V.A. learned for the first time of the existence of the memorandum of April 24, 1922.

(*v*) On June 27, 1922, Parliament adopted for future cases from July 1, 1922, to a large extent the procedure contained in the memorandum of April 24, 1922, allowing, however, six months' grace to those with dependents, and extending for one year the Act as amended.

(*w*) After December 2, 1921, seventy-six applicants seriously ill and without dependents were refused insurance. None of these have been reviewed.

(*x*) Between January and July 1, 1922, insurance was refused or withheld from nineteen applicants with dependents. After July 1, when the new procedure came into force, these cases were reviewed and insurance granted in all cases except seven, who had meanwhile died. Concerning these no relief has been granted.

Conclusions re Insurance

The Commission concludes that the understanding on which the Returned Soldiers' Insurance Act was passed was that an option was thereby granted to ex-service men to take insurance at standard rates, without regard to physical condition, or the existence of actual dependents, or as to whether physical impairment had any relation to war service. The only exceptions were where the physical impairment was due to self-inflicted injuries or immoral conduct, or where the application was fraudulent. The power of the Minister to refuse applications or require medical examination was to be limited to these cases. It was not considered that the fact that the applicant was on his death-bed constituted fraud, and this is shown not only by the discussion in Committee and in Parliament when the Act was passed, which contemplated and expressly mentioned death-bed applications, but it is confirmed by the fact that the Committee in 1921, having in mind three cases where the applicants died within one, two and six days respectively, after the application was sent in, and insurance had been refused because they had not lived the fourteen days specified in the regulation, recommended the repeal of the regulation and the substitution therefor of a regulation to the effect that insurance should be in force on approval of the application, without waiting for the delivery of the policy.

Neither was it intended that the beneficiary should necessarily be a dependent of the applicant, and this is shown by the Act itself, which specifies who may be beneficiaries, and makes no requirement that they be actual dependents.

This option, which was thus open to practically every ex-service man, was offset by the important condition that it must be (but it could be) exercised at any time within two years. A further limitation was imposed that no man could obtain more than $5,000 insurance.

There is no suggestion in the evidence that the Pensions Board was not fully cognizant of the understanding, and it can be fairly assumed that from

its position as administrator of the Act it must have been fully aware of the situation, and that it had ascertained from every available source the intention as to the grounds on which the Minister should exercise his power of refusing applications. But further than this the opinion of the Commission is that the knowledge of the Pensions Board as to this understanding is shown affirmatively in the evidence, particularly in the literature issued, the public declarations made, and the practice of the Pensions Board for nearly sixteen months.

It is true that it was represented by the Pensions Board to the Minister in the interview of July 19, 1921, that it was never the intention of the Act to grant insurance to individuals languishing at the point of death, and that it suggested that these cases should be refused if the state of health was not due to war service. But this must be contrasted with the specific indication of policy given by the Parliamentary Committee of 1921 arising out of discussions at which representatives of the Pensions Board were present, when the Committee recommended a regulation letting in a man who only lived long enough to have his application approved, and it is also to be considered with the statement made at the same interview on July 19, 1921, by Major Topp and by Mr Finlayson (the Superintendent of Insurance, who was before the original Committee of 1920, and was their expert adviser in framing the Act), who both opposed the suggestion of medical examination, "as it would defeat the original intention of the scheme." Mr. Finlayson adding the specific statement that in

> *originally considering the scheme the Government was fully aware of the fact that a number of individuals in serious physical condition from causes other than war service would be insured, and for this reason the time during which applications would be received was limited.*

Notwithstanding the foregoing, the Pensions Board endeavoured to procure the approval of the Minister of Finance to regulations which would make the right to insurance conditional on the state of health of the applicant. When approval was withheld, the Pensions Board considering that in view of the excessive mortality rate the time had arrived for imposing restrictions, in January, 1922, itself initiated the practice of requiring medical examinations or medical certificates respecting those who were ill, and of refusing to accept certain applications on account of the degree of illness found.

So far as the evidence shows, the Pensions Board up to February 23, 1922, had no authority to reject any applications except when there was fraud, immoral conduct or self-inflicted wounds. After that date to March 15, it had whatever authority was given it in the verbal interview of February 18 and February 22. But after March 15, its only authority to reject was in cases with no expectation of life and no dependents. After March 30, 1922, its instructions from the Minister were to reserve what seemed to it to be "doubtful" cases.

To include in the "doubtful" class the "seriously ill" as well as those with "no expectation of life" was substantially beyond even the principle which the Pensions Board, in its letter of March 21, 1922, had sought to have the Minister adopt. The most it had proposed was to shut out those cases "hopelessly ill" in such an advanced stage that they would probably die within a "short period". The fact that "seriously" was not necessarily "hopelessly" ill and might not produce death within a short period is cogently shown by the fact that twelve of the nineteen applicants with dependents' rejected under the practice laid down in the memorandum of April 24, 1922, were living after July 1, and were considered entitled to have their cases reviewed and their insurance granted under the six months' grace clause of the 1922 amendment.

The danger of exploitation was the basic reason for the necessity of increasing the classes of cases in which the Minister might exercise the power of refusal. Enough has been said to indicate that the effect of the Act was quite realized when it was passed and at least nothing had come to light which could not be foreseen. It was obviously to be expected that applications would increase in number as the date approached when the Act would expire. It could not be said to be exploitation if those who came within the terms of the Act availed themselves of its provisions even though it involved substantial lose to the country. On the other hand, if exploitation really meant fraud, the understanding always had been that cases of this kind should be rejected and no further regulations were necessary. The cases of fraud could be dealt with as such but it was, in the opinion of the Commission, a mistake to propose regulations which, while possibly useful in shutting out cases of actual fraud, resulted in the automatic exclusion of many applicants whose only defect was that they were seriously ill or had no expectation of life, and those applications would not be said on that account to be fraudulent since the insuring of these was distinctly contemplated. There is as a matter of fact no contention that the regulations were to shut out fraudulent cases ,and it would seem that the Pensions Board, in endeavouring to minimize the apprehended loss to the country, had simply selected for rejection in future the class of applications which in its opinion were the least deserving, but without any imputation of actual fraud.

The circumstance that the Pensions Board, while declining applications, left the matter open to the extent of referring it to the Minister, recommending that the application be not accepted, or treating the case as "doubtful" and refusing the application, did not make the attitude of the Pensions Board any less decisive. It was not simply an academic declaration of principle. The Pensions Board was the body which primarily indicated the policy to be followed and its refusal to accept applications, even though subject to review, disposed of the case for all practical purposes so far as the Pensions Board was concerned.

The Commission considers that, in view of the circumstances detailed at length above, the Penions Board was not justified in disregarding the understanding that the paretically unconditional benefits of the Act were to continue until September 1, 1922, and in considering, as it did in its letter of January 16, 1922, that the time had then arrived for curtailing these benefits. The occurrence of an excessive mortality rate was not a sufficient reason for imposing new conditions while a substantial period remained during which the full privileges of the legislation were to be available.

Neither was the Pensions Board justified in urging approval of the practice of rejecting applications of those whose expectation of life was brief.

Nor was the Pensions Board justified in going farther than the authority of the Minister of March 15, 1922, (which was to reject those with "no expectation of life" if they had no dependents) and in actually rejecting applicants in a less critical condition described as "seriously ill" thus shutting out a new class not previously contemplated in the correspondence.

Nor was the Pensions Board justified, in its letter of March 21, 1922, in seeking to go farther than the Minister's considered decision of March 15, 1922, by means of a suggested interpretation of the Minister's preliminary reference to the obvious intention of the Act. This suggested interpretation was to authorize refusal of insurance even to those with dependents if the illness was not due to war service, although the Minister, after stating the general intention, had strictly confined the refusal of insurance to those without dependents.

Nor was the Pensions Board justified (after the Minister had suggested in his letter of March 30, 1922, that they reserve "doubtful" cases for investigation

by the Parliamentary Committee) in treating as "doubtful" and refusing to accept not only applications of those with no expectation of life, but also of those "seriously ill" even if they had dependents, thus again throwing the weight of its decision in favour of rejection of this new class not previously contemplated in the correspondence. The memorandum of April 24 specifically stated that this class was "refused".

The Pensions Board was the advisor of the Minister and was invested with the responsibility primarily of laying down the policy to be followed in the administration of the Act. Its opinion and its action, while always subject to review by higher authority, obviously carried decided weight in the ultimate disposition of the application. In the opinion of the Commission, instead of permitting an unexpected financial responsibility to obscure the scheme of the legislation whereby generous provisions were offset by a limit of time and amount, it should have pointed out the effect of summarily introducing conditions which were inconsistent with the previous understanding and practice and which were negatived by the publicity which had been given to the attractive features of the Act. The radical change of policy is shown by contrasting the practice followed by the Pensions Board when originally conforming with the understanding under which the Act was passed, assuring the benefits of the Act to all ex-members of the forces without medical examination, with the practice actually instigated and promoted by the Pensions Board in 1922 culminating in not only exacting medical examination when applicant was under medical treatment, but in debarring from insurance all ex-service men seriously ill (although not necessarily in imminent danger of death) unless they had beneficiaries actually dependent upon them for support, and besides a disability attributable to service.

Even if the Pensions Board had been justified in its action, the utmost care should have been taken to see that ample advance notice was given of the intention to impose new restrictions; particularly as there would be many who had delayed their applications until the last days of the Act and who would be shut out by these regulations.

It is quite easily conceivable that a man in impaired health, with very limited resources, relying on the understanding that his state of health made no difference in his right to insurance, would put off the expenditure involved in paying premiums until a date when he was more certain whether his physical condition made immediate insurance desirable, and it is not in keeping with the principle on which the benefits of this Act were extended to ex-service men, that when he came to make his application although within the time limit fixed by the Act, he should find that without notice of any kind the benefits which he had been led to depend on had been withdrawn. There was also the man who had been endeavouring to get pension and who, believing that he could get insurance any time before September 1, 1922, regardless of his state of health, delayed application for insurance (which involved expenditure) until he ascertained whether his pension application was successful; when he finally received an adverse decision as to pension he might discover that these regulations made in the meantime without his knowledge and without any publicity had deprived him of insurance as well.

Generally speaking these restrictions were not imposed on the man with actual dependents, but they were not even confined to him exclusively. In any case even the man without actual dependents had a right to expect insurance up to September 1. 1922, which should not have been summarily withdrawn. As to the claim that only dependents could benefit by the Act, it cannot be said that because a beneficiary is not at the moment of application actually dependent on the insured he has no right to consideration. There are

many cases in which a father, who may not at the moment be actually dependent on the son, may become so with advancing years.

The strong contention made as justifying the action of the Pensions Board is that it received authority from the Minister to reject certain applications and that Parliament substantially adopted the procedure which the Pensions Board had been following. Obviously the Minister's authority is a complete justification for any subsequent action within the scope of that authority, but the Minister's authority which is contained in the letter of March 15, 1922, was only for the rejection of applicants with no expectation of life and no dependents; it was not retroactive and in view of what has been said as to the position of the Pensions Board in advising and initiating the policy of administration, it did not justify the Pension Board's action two months previously in altering the policy by requiring medical examination and deciding that, so far as they were concerned, applications of those found to have a brief expectancy of life were to be rejected and without reference to whether the applicant had dependents or not.

The fact that the Minister adopted to a limited extent the view pressed upon him by the Pensions Board does not relieve it of responsibility for advocating more drastic action; it is the insistent attitude of the Pensions Board which the Commission questions, shown throughout the evidence and illustrated by their continuing to urge additional restrictions which had in effect been disapproved by the Minister, and by their indirectly putting in force both these additional restrictions as well as further limitations by treating certain cases as "doubtful" and refusing to accept the application. Had the Pensions Board kept in mind the scheme of the Act it would not have felt it necessary to have taken this attitude as the whole Act terminated within nine months.

The action of Parliament in adopting, from July 1, 1922, substantially the procedure followed by the Pensions Board does not, in the opinion of the Commission, justify the instigation of the restrictive policy by the Pensions Board nearly six months previously. The Act was not made retroactive and the previous practice of the Pensions Board was left without ratification so that all cases affected had to be reviewed. There is the further consideration that Parliament was dealing with the matter on an entirely different basis from the Pensions Board—Parliament anticipated by two months the expiry date of the Act as to certain classes, but as a quid pro quo it extended the restricted Act for another year and the action of Parliament was therefore in the nature of a new proposal.

The Commission finds that the Pensions Board, as public trustee, took what it deemed to be the necessary action in the interests of the State, and there was no motive on its part other than to perform what it considered to be its duty. It is evident that it would have been the line of least resistance and would have entailed much less investigation of cases and difficulty in decisions to have allowed the situation to take care of itself, by not interfering. It is the unauthorized form which which this interference took which the Commission considers was not justified, and while improper motive is entirely wanting, this affords slight satisfaction to those who have been deprived of the benefits of the Act.

The complaint of the G.W.V.A. is that "secret regulations" as to insurance were introduced by the Pensions Board in "direct violation" of the "intention of Parliament." Strictly, the intention of Parliament is shown by the Statute itself, and the Statute gave discretionary power to the Minister to refuse applications and to order medical examinations. The requirement of medical examination, in individual cases where some doubt as to the propriety of entering into a contract was entertained by the Minister, was not in violation

of the intention of Parliament in the sense that it was unauthorized by the Statute; but the adoption of a general practice that medical examination was to be required in all cases, or in a particular class of cases, without considering each case on its merits as it came up was, in the opinion of the Commission, not in accordance with the intention of Parliament as expressed in the Statute itself. The underlying principle is contained in Section 15 to the effect that there shall be no medical examination and this could not, in the opinion of the Commission, be contravened except in the exercise of discretionary power in each individual case. The Statute did not authorize a general practice which in effect made a medical examination a condition precedent to the consideration of a certain class of applicants. In any case, the understanding given at the time the Statute was passed was that in only certain classes of cases would this discretionary power be exercised, and this understanding was recognized by the Pensions Board in the literature circulated and public declarations made, and in its practice for over sixteen months. A practice was initiated later by the Pensions Board which was contrary to this understanding, and was secret in the sense that no notice was given, in advance, of the intention to alter the practice due in force. Such notice was clearly required in view of the representations made as to the principles on which the discretionary power of the Minister would be exercised, and in view of the fact that the benefits of the Act were to be in force for a fixed period. Neither was any general notice given at the time such regulations were inaugurated similar to the publicity which had been given to the previous practice.

In consideration of the foregoing the Commission is of the opinion that provision should be made:—

(*a*) To review all applications which would have been affected if the recommendation of the Parliamentary Committee of 1921, as adopted by the House of Commons, had been carried out; such recommendation being to the effect that, in the absence of fraud, the policy should be in force from the time of the approval of the application and receipt of the premium, and that these cases be dealt with on such review as if the regulations mentioned in such recommendation had been framed and operative;

(*b*) To review and issue policies in respect of all applications which have been rejected since the inauguration of the practice referred to in the letter of the Pensions Board, to the Minister, of January 16, 1922, and up to July 1, 1922, except in cases of self-inflicted wounds, immoral conduct or where the application is fraudulent;

(*c*) In respect of applications coming within recommendations (*a*) and (*b*), where the applicant is dead, to pay insurance as if the policy had been issued and delivered in the life-time of the applicant.

PART FIVE

COMPLAINTS RE GENERAL ATTITUDE AND POLICY OF ADMINISTRATION

The claims made by the G.W.V.A. in particularizing the complaints in the telegram that ex-service men have been deprived of their rights and that this is the "Culmination" of an "unsympathetic policy of increasing severity" during recent months, are:—

> That the general procedure of the Board has been such as to place the burden of proof with regard to attributability entirely upon the claimant for pension and that as a result many ex-service men and dependents have been denied a proper opportunity to establish their rights.
>
> That pensions have been reduced following a review of the findings of local examiners by the headquarters office in a manner contrary to the procedure announced before the Select Committee of the House of Commons.
>
> That undue severity has been exercised with respect to disability ratings which to some extent confirms the report that secret instructions have been issued to reduce pensions in every possible way.

Necessarily, these general complaints cannot be dealt with in separate water-tight compartments, because they all involve the general attitude and method of the Pensions Board in dealing with applications.

The general allegation is that men have been with wrongful intent deprived of their rights. So far as any improper intent is concerned, this is, in the opinion of the Commission, wholly unsupported by evidence; but, if men have not received the consideration to which they are entitled, it matters little from their point of view what is the motive which has induced that situation.

The mass of evidence presented has been with the object of illustrating various ways in which it is claimed the rights of ex-service men have been prejudiced.

The evidence consisted, generally speaking, of statements by representatives of the Pensions Board as to its organization and administration and as to the practice and policy followed in dealing with applicants for pension. In addition to this, the G.W.V.A. presented over one hundred cases to show how the practice and policy of the Pensions Board has been applied. Each case was gone into thoroughly, first by the G.W.V.A. presenting evidence from the file on which it was claimed pension should have been granted, and immediately following this by a representative of the Pensions Board (generally Dr. Burgess) presenting from the same file the reason why pension was refused. Practically all the important documents relative to these cases were put on the record and the Commission was able to judge at first hand what factors were considered as important by the Pensions Board in making decisions in concrete cases.

Generally speaking the point of difference arose in connection with a single question, namely, whether the circumstances (including the opinion of medical men) were sufficient to justify the conclusion that the disability was related to service. At times, the question of law came up as to whether, in the particular case in hand, the disability had to be "attributable to service" instead of simply

being "incurred during" service. And sometimes, a question arose as to what the applicant's rights were, in view of his having had a disability when he enlisted.

After hearing all this evidence, the Commission is of the opinion that, outside the matters discussed in previous parts of this report, there exists certain features of Pensions Administration which have adversely affected applicants' rights, and which, if uncorrected, will continue to do so.

It is with a view, not simply of specifying the grounds for this conclusion, but also to assist in the correction of these conditions by calling attention to them, that the Commission instances under separate headings some of what they consider to have been the contributing factors.

Most of the cases which were presented were those which had been brought to the attention of the G.W.V.A. by the applicant. It was naturally contended that those comparatively few cases, out of the thousands decided, could not be conclusive as to the general policy of the Pensions Board, but the fact remains that if what is stated as being the general policy has not been adopted in these cases, there is ground for complaint. At this stage of Pensions administration, it cannot be sufficient to say that, because a large percentage of cases may have been decided correctly, it becomes any less necessary to see to it that the remainder are similarly dealt with. The object which the country desires is to see that every effort is made to ensure that there be no objections in awarding pensions to those entitled thereto.

There is, however, no suggestion by the Pensions Board that these cases are exceptional ones where errors have inadvertently crept in; after a full discussion of the cases from all angles, the Pensions Board in its factum (Record, pp. 3719 and 3738) states that these cases have been "correctly adjudicated upon by the Board, both from a medical and legal standpoint," which indicates that similar cases would continue to be decided in a similar way.

If these cases are typical of the general policy as carried out in practice, they become even more important. The Commission has heard nothing on the investigation which would justify treating these cases other than as fairly representative of the consideration given, and of the way in which general principles are applied in the usual course of pensions administration. It is fully appreciated that most of these cases were difficult, but the very matter under investigation on this branch of the inquiry is as to how these difficult cases are dealt with. Naturally the clearcut cases would very seldom be in question. It is not for a moment assumed that there are not many cases in which the greatest leniency has been shown in conceding pension, but whatever may have been done in other cases, those in evidence have been the subject of a great deal of discussion, as the files show, and there is no likelihood that they do not represent the considered view of headquarters as to the principles involved.

As was made clear on the investigation, the Commission, in hearing these cases, was not sitting in any sense as an appeal board. It was simply putting itself in the position of the Pensions Board taking the various medical opinions as they stood, and with the other facts and circumstances as presented on the file, endeavouring to determine whether all facts bearing on the case had as far as possible been collected, and having been collected, to determine whether all the evidence, including the medical evidence, which was often conflicting, had been fully considered and that due weight, according to their importance, had been given to the various circumstances shown and a reasonable conclusion arrived at. In many cases where it was impossible to reach a conclusion not open to more or less doubt, was the benefit of the doubt given the applicant, and if so, what degree of probability was necessary in order to establish his case?

DEGREE OF PROOF REQUIRED FROM APPLICANT

While the applicant has the burden of proving his claim, the statement has been generally made before Parliamentary Committees, and it was repeated very emphatically on the investigation, that in dealing with applications for pensions if there is any reasonable doubt the applicant is given the benefit of it. (1922 Parliamentary Committee Proceedings 349, Record pp. 1293, 896, 710, 1654, 1660.) This was carried to the extreme by one medical adviser who intimated that a very small fraction of doubt in favour of the man was sufficient to warrant pension. If this means anything it is, not that the applicant has to establish his claim by a preponderance of evidence as in an ordinary civil case, but that it is enough if he can bring evidence to create in the mind of the tribunal dealing with his case a reasonable doubt as to whether his pension should be refused.

Sufficient has been shown, in the evidence before the Commission, to quite justify the conclusion that the statement that the applicant is given the benefit of any reasonable doubt cannot be taken as expressing by any means an invariable principle of pensions administration. Numerous cases were presented in which, in the opinion of the Commission, there was clearly a reasonable doubt established in favour of the applicant, but pension was refused; and in many of these the applicant showed not only a reasonable doubt but a preponderance of evidence in his favour.

WEIGHT GIVEN TO EVIDENCE AND OPINIONS OF MEDICAL MEN WHO HAVE SEEN THE APPLICANT

Many instances were given in evidence where the local Pensions Medical Examiner, after seeing the applicant and hearing his story, was of opinion that the disability was related to service but his opinion in this respect was overruled by Assistant Medical Advisers at Headquarters and pension refused. The decision of many of these cases depends not nearly so much on medical knowledge and experience, as on the history given by the man of his ailment in trying to establish that it originated during service and has been continuous since. On well recognized principles, the examiner who has the opportunity of seeing the man, listening to his story, testing his genuineness by means well known to men of experience in this work, and generally sizing him up, is in a far superior position to one whose knowledge of the case only comes from the written reports of another and therefore depends, to a large extent, on the ability of this other to put into words the actual conditions which he has observed.

There is the further consideration that very often the evidence establishing continuity is supplemented by statements of a man's family and friends and by other people who know him in the community, and, speaking generally, the opportunity for a local Pensions Medical Examiner to enquire into and judge of the weight and value to be attached to these is at least equal to and generally greater than that of a medical advisor at Headquarters. The apprehension that the local man will be more easily affected by considerations of sympathy, has (as will be seen from the evidence of Mr. Archibald quoted hereafter) proved unfounded in connection with his estimate of the degree of disability, and there therefore seems to be no reason why this should be an objection in giving at least equal weight to his opinion as to the relation of the disability to service.

There are cases, of course, when pensionability depends on factors other than those mentioned above, but the Commission considers that where the decision as to the relation of disability to service depends on evidence such as has been indicated, even though there is conflicting medical opinion, the views of the local Pensions Medical Examiner as to pensionability are entitled to just as much consideration as his opinion respecting the degree of disability.

ABSENCE OF CORROBORATIVE EVIDENCE ON MEDICAL DOCUMENTS OR OTHERWISE

This subject follows naturally the above reference to the methods of verifying the applicant's statement. Cases have been presented in which the Medical Advisors at Headquarters have disregarded the history of the ailment, as given by the man, for the reason that the documents did not contain corroborative entries.

It is well understood that the documents of the first two years of the war are not by any means complete, and those who have watched the examination of thousands of soldiers on demobilization recognize the comparative ease with which an omission may be made in an entry which will, if such document is used as evidence against a man, result in substantial detriment later. On the other hand, entries in the applicant's document, when tending to disprove his statement, were often accepted without hesitation and without regard to what is well recognized, viz., that many of the entries particularly in the class of "Heart Negative" "Chest Negative" and "Other Systems Normal" were often made after a rapid, incomplete and perfunctory examination.

The Commission considers that the history of an ailment given by the man, and believed by the local Pensions Medical Examiner, should not be disregarded simply because the documents do not contain corroborative entries.

The requirements as to corroboration of an applicant's statement in other ways than by documentary evidence have been very exacting. It is recognized that, on well understood principles, the statement of a person which is favourable to himself is taken with greater caution than an admission by him which is against his interest, but the evidence shows that this principle has been extended to a very marked degree. There are cases in which most positive and unqualified statements have been made to an applicant to the effect that no evidence whatever had been produced, although he had submitted considerable evidence in support of his case; and under this general heading can be mentioned cases, which were put in evidence, in which the opinions of specialists of outstanding ability and experience, who had the opportunity of observing the men for a considerable period, were disregarded even though those opinions were in direct corroboration of the statement of the applicants themselves. Naturally, with an inexperienced man, this may result in discouragement and a complete cessation of any attempt to further establish his case.

There is also shown in the evidence a great tendency to accept as conclusive against the applicant the answer, recorded in his documents, as having been made to some enquiry of a medical examiner during service or on discharge. Enough has been said as to the danger of placing too much reliance on these records. Allowance should be made for the circumstances under which these answers may have been given. Questions may have been asked in such a way as to appear casual and as a matter of form, and the answers given without consideration or attempt at accuracy, and more or less haphazard, and without realizing the possible future effect of the information thus conveyed.

The degree of corroboration to be required can, in the opinion of the Commission, be the subject of no definite rule, but must depend on considerations which enter into the decision of any case, including the character and reputation of the applicant, his war record involving length and nature of his service, the opinion of the examiner as to the possibility medically of his disability being related to service, and not overlooking the fact that circumstantial corroboration may be most convincing, notwithstanding the documents show no entries whatever.

SUBJECTIVE SYMPTOMS

Considerable evidence was given to show that symptoms which were not capable of objective demonstration were disregarded. The attitude on this subject is set out in a letter from Dr. Arnold, Chief Medical Advisor to the Pensions Board, (Record p. 2877) in which it says:—

> I do not believe that as a general thing it is wise to pension unless there is some objective sign of disability.

The Commission considers that, as a general rule of practice, no exception can be taken to the exercise of great caution in admitting that a disability exists where no physical evidence is apparent. This means that if the applicant shows no objective evidence, the Pensions Medical Examiner must exercise that much greater care in deciding whether the man actually has a disability and, if necessary, call to his aid expert opinion before finally deciding that no disability exists. To refuse to consider cases favourably, simply because objective symptoms are not present, might shut out deserving applicants such as some types of neurasthenics whose disability, though not capable of being demonstrated by touch, sight, or hearing, might be just as real and just as effective in reducing their normal ability as if the symptoms were easily apparent; and to make a general rule shutting out those with no objective symptoms would be to stamp all such applicants as malingerers.

This brings up again the importance of the personal examination, because, unless the arbitrary rule is laid down that subjective symptoms only are not sufficient evidence of a disability, the man who has seen and heard the applicant, and examined and tested him, is in a far superior position to estimate the actuality and the degree of disability, than the man who only sees the documents and can get no help from them because of the absence of any objective symptoms which could be described.

The principle was adopted in Pensions practice generally, in 1919, that the local Pensions Medical Examiner was the one whose judgment would be paramount in determining the degree of disability, for the very reason that he had the opportunity of actually seeing the applicant and diagnosing his condition.

Another reason for the adoption of the practice was that it was realized that many competent medical men might be absolutely accurate in their conclusions as to the man's condition, after personal examination, but might not have the faculty of being able to describe it in words and, consequently, if the Assistant Medical Advisor at Headquarters were to review the findings of the local man, the applicant would suffer simply because his actual condition had been insufficiently described. This practice and the circumstances leading up to it, and the reasons for its adoption, are shown in the evidence of Mr. Archibald, the legal advisor of the Pensions Board, given before the Parliamentary Committee of 1919—First Session. (See Report of Committee proceedings p. 32). Following is a short extract from this evidence:—

By Mr. Sutherland:

Q. Col. Belton, I think it was, last year was very emphatic on that point that they were in a better position to accurately estimate a man's disability than the medical man who examined him, who was liable to be influenced by sympathy?—A. Last year that was the opinion of most people that had any connection with the pensions at all except the Great War Veterans' Association. We have come round now to the Great War Veterans' Association point of view; we think they are absolutely right, and there are very *few people* in the office now who think that

they can *estimate pensions better* at the head office *than the medical examiner who sees his man.*

Mr. Archibald just before this had said:—

By Mr. Nickle:

Q. You are diametrically opposed to that in principle?—A. Absolutely no. *One of the reasons* upon which it was decided to decentralize the Board of Pension Commissioners was that it was practically impossible to describe weaknesses. One medical man *might describe* a particular disability as "very weak, cannot walk more than half a mile without a loss of breath;" another man might describe exactly the same condition as "seems weak, walks with difficulty," and another man *might describe* exactly the same condition in an entirely different way from either of the two; it might make a difference of anything from 10 to 50 per cent, just through the fact that the descriptions were not, very well written to start with and were not very well interpreted to finish up with. *So we think that the doctor who sees the soldier is the one to say what the disability is.* Last year there was a great deal said about too much sympathy, the danger of *too much sympathy;* but we have not found it at all since this scheme has been in operation; we do not think, with regard to the medical examiners, that *sympathy bears any relation to the percentage of disability at all.*

The case in which Dr. Arnold had given the opinion quoted above was one where the local neurological expert had, after thorough examination, given his opinion that there was a substantial disability but without objective symptoms, and had further stated that there was no reason to question the man's good faith. Pension was refused, however, following Dr. Arnold's letter, and the reason given in the statement of the Pensions Board on this investigation (Record p. 2878) in reference to the case was that:

> in the entire absence of any objective symptoms pension could not be awarded on subjective complaints only.

The commission considers that no arbitrary rule should be laid down to the effect that disability cannot be admitted if the symptoms are only subjective, and that the practice of giving paramount consideration to the opinion of those who actually examine the applicant, as to the existence and degree of disability, should apply in all cases whether the symptoms are subjective or objective.

DECISIONS WITHOUT REFERENCE TO THE PENSIONS COMMISSIONERS

The evidence shows that in the last analysis, and after the facts have been gathered and the conditions described and opinions expressed by medical men, the ultimate decision as to pensionability requires not so much technical and scientific knowledge but rather sound judgment, and the ability to weigh evidence and probabilities in the same manner as any other judicial tribunal. It is necessary of course that this tribunal should have technical advisors, but as is probably not generally understood, the actual decision in all but a very small percentage of cases is made and communicated by a single assistant medical advisor acting nominally in his advisory capacity, but in effect exercising judicial functions as far reaching as those of a member of the Pensions Board.

Whether or not the possible effects of this practice are fully realized is not known but, as may readily be seen, it may result in lack of protection to ex-service men and their dependents and to the State as well. The aim is to

do full and ample justice to the ex-soldier and his dependents, not losing sight of the heavy obligations involved, totalling over thirty-five million dollars annually at present, with commitments for many years to come. The necessity for checks from both points of view is apparent.

Section 3 Clause 8 of the Pension Act requires the approval of the award or refusal of any pension to be evidenced by the signature of at least one of the commissioners. The evidence before this Commission is that, on account of the large number of applications, the acceptance or refusal of a pension is simply initialed by a member of the Board and that this is, in the great majority of cases, only pro forma and not in any sense an exercise of judicial discretion.

There are instructions to the effect that cases where there is a difference of opinion between the local Pensions Medical Examiner and the Assistant Medical Adviser at Headquarters shall be referred to the Pensions Board. The practice is that the Assistant Medical Advisor at Headquarters who disagrees with the Local Pensions Medical Examiner takes up the discussion of the case with him by correspondence, and it is only when the local Pensions Medical Examiner ultimately persists in his opinion, that the case comes at all to the Commissioners. These discussions between the local and Headquarters officials involve very often not only medical opinion but questions of law and fact, and, without casting any reflection on the good faith of either, it can be readily seen that the local man would, in the very nature of things, be reluctant and very often not sufficiently informed to maintain his position against the statements and opinions of Headquarters.

There is in evidence a substantial number of cases which were never referred to the Pensions Board, or any member thereof, and in which pension was refused. These were cases in which, in the opinion of the Commission, the benefit should have been given of joint consideration by at least two of the Pensions Board approaching the question of right to pension from an angle different from the exclusively medical.

The Commission considers that some plan should have been evolved to ensure that these difficult cases were brought to the attention of the Pensions Board or at least of one of its members. One way to effect this would have been to require that if the Assistant Medical Examiner at Headquarters did not agree with the recommendation of the local Pensions Medical Examiner in the first instance, the case be passed upon by at least one of the Pension Commissioners themselves, and that in any case where pension had been refused, any subsequent request for reconsideration should equally be submitted to at least one of the Commissioners.

It is recognized that in view of the limited personnel of the Pensions Board it might have been a physical impossiblity for the members to take on additional cases for decision, but the evidence shows that the Pensions Board required to be referred to it classes of cases of less importance, in the opinion of the Commission, than those under discussion. In any case, if the organization was not sufficient, the remedy was to make necessary representations accordingly.

ASSISTANCE GIVEN TO APPLICANT IN ESTABLISHING HIS CASE

The complaint is made that it has been found necessary for applicants to procure the intervention of some third person or organization in presenting their claims. There is evidence that where the claim has been taken up intelligently and aggressively by an organization, the application which had previously failed finally succeeded; but the Commission is not prepared to say that this indicates any fault on the part of the Pensions Board. The theory of the Pensions Board being an advocate of the man himself can easily be carried too far.

The Commission considers that the duty of the Board will have been fairly done if it gives to the applicant correct and clear statements as to the principles on which pensions are granted, indicates the lines along which evidence is required, and, where possible, utilizes any available staff in assisting the soldier in procuring and putting into shape this information. As has been stated elsewhere, in case of refusal of pension, the applicant is further entitled to know the correct grounds on which the decision is based.

The evidence shows that in many cases the responsibilities indicated have not been recognized. The attitude assumed frequently has been simply to deal with what was submitted, without giving information not actually asked for, and to intimate with an assurance at times hard to understand that no evidence had been produced on which pension could be granted, leaving it entirely to the applicant to ascertain in what respect his case was deficient.

GENERAL ATTITUDE

The Commission, in the consideration of the matters under investigation, has not lost sight of the serious difficulties surrounding the administration of the Act. It is quite realized that the three Members of the Pensions Board are responsible for decisions in probably more cases annually than all the Superior Courts in Canada combined, and that these involve, as has been said before, not simply the expenditure of immense sums of money annually but heavy commitments for the future. It is difficult to conceive of any public body which is performing a more exacting and onerous duty demanding every quality, not only of efficiency and honesty, but of sound judgment and sympathy as well. It realizes equally that the Pensions Board is constantly besieged with applications which have no merit, making it necessary to exercise the utmost vigilance in order to perform its duty to the State. It, at the same time, must take scrupulous care to do full and ample justice to those for whose benefit the legislation was passed.

The Commission considers that the general attitude assumed by the Pensions Board did not always keep in view the peculiar nature of the legislation which it had to administer. It is not, as has been so often repeated, that there was any wilful intention to deprive applicants of their rights; but the position repeatedly and emphatically taken by the Pensions Board before the Parliamentary Committee of 1922 and on this investigation was that it had no discretion, that the matter was purely one of law, that there was no room for the merits of a case to be considered and no room for sympathy, and that no attention would be paid to what was said in the House or in Parliamentary Committees or elsewhere. (See 1922 Parliamentary Committee Proceedings p. 348, 351, 352, 357, and Record p. 424, 1281, 1293, 1295, 1296).

This attitude in the opinion of the Commission was not justified by the circumstances. The law was in some cases capable of more than one construction. The Pensions Board was the judge not only of the law, but of the facts. The personnel included Medical members, so that it was not left to depend on outside medical findings but could come to independent conclusions on questions of medical opinion as the occasion warranted. The professional qualification of its members enable it to issue instructions to its Medical advisers and staff to the effect that certain presumptions of fact were to be made and certain conclusions arrived at under certain circumstances. An instance has been given in respect of Section 25 (3) where instructions of this sort were issued with the effect of completely escaping the strict interpretation of the law. In another instance the Chief Medical Adviser indicated that if he had seen the case the medical findings would have been changed so that the case would not

have come within the strict letter of the law (1381-2). In short the medical uncertainties of a case very often permitted the making of bona fide findings of the fact which would prevent the operation of an inequitable though strictly legal interpretation of the statute.

Further than this, the statute had been drafted and put forward by the Pensions Board and in certain instances it had been publicly explained by or in the presence of the Pensions Board's Representatives, and its meaning had been stated in the House by those who had the Bill in charge and who would have been the first to see that remedial measures were taken to implement these explanations if they proved incorrect. The Pensions Board itself was the sole and final judge as to how the Statute was to be interpreted and applied.

The Commission considers that in these instances every available and just means should have been invoked to recognize the understanding given, by adopting where possible an alternative construction of the act or by making where it could be done findings which would obviate the strict application of the law.

The Commission quite realizes the legal argument which might be made against this course but this would not be the first instance in which judicial tribunals had considered that similar means were justified by the end in view. In fact one of the contentions strongly urged on behalf of the Pensions Board was that, because the Board believed the public of Canada would be behind their action, they did not hesitate to interpret the 1919 Act so as to include discharged men after the Declaration of Peace, notwithstanding a strict construction of the Act would have shut these men out. (Record p. 992-1000, 1033, 1240, 3560. 3567, 3608).

In view of the nature of the legislation and the absolute and final authority conferred on the Pensions Board, it could be safely assumed no exception would have been taken to its acting and deciding on the law and facts as it was considered the extraordinary circumstances demanded, until the apparent inconsistencies between the explanations and the strict legal interpretation of the Statute could have been brought to the attention of Parliament for further consideration.

If the circumstances were such as to prohibit either of the courses suggested (and the Commission is not at all convinced that this was the case), then the Pensions Board would have been well advised in informing those in authority when inconsistencies of this kind became apparent, and in ensuring knowledge of the situation by those who were recognized as representatives of important groups of ex-service men. Nothing could more quickly arouse suspicion and de-troy confidence than a ruling on the Statute made within the walls of what might be regarded to some degree as a judicial sanctum, and which ruling, when promulgated, was found to be inconsistent with the understanding not only of those whom it affected but of others who took part in the enactment of the Statute of which it is an interpretation.

The same consideration would seem to apply to the rulings which would often have to be made by the Pensions Board as cases came up involving new facts and new situations. To make rulings which establish important and far reaching precedents without communicating them to anyone but the applicant and without discussing them with those who are recognized as representing the classes affected, while quite within the strict legal rights of the Pensions Board, was almost certain to create misunder-standing and might easily lead to injustice.

On account of the peculiar nature of the subject matter and the centralized method of making awards, it is not a severely judicial attitude but rather one of sympathetic co-operation and, above all, the avoidance of any suggestion of detachment and secretiveness which is essential.

It must be remembered that the Statute is surrounded by conditions quite different from those affecting ordinary civil rights granted by Parliament. The interpretation of general legislation can always be the subject of argument and open discussion before the tribunal which makes the decision. These tribunals are conveniently situated in all parts of the country. The facilities for face to face presentation of his claim by the applicant for pension are much more circumscribed. Every applicant who desires personally or by representative to appear before those who decide on his rights must come to Ottawa.

Again, decisions on general legislation involve considerations of relative commercial advantage which are entirely foreign to pensions. Pension legislation and administration have always underlying them the intention and purpose to carry out fully, and without the implication of withholding, the assurances which were readily given at a time when there was no suggestion of terms nor conditions either by the country or the soldier.

PART SIX

CONCLUSION

The Commission has attempted to sum up, under the individual headings into which this report is divided, its conclusions on the subject matters dealt with. The facts and the surrounding circumstances are too numerous and involved to make it possible to summarize them adequately without repeating a large portion of what has already been said.

The Commission therefore refers to the recapituations and conclusions to be found under the parts of this report referring to:—

Complaints *re* Section 11 of the Pension Act (Part Two).
Compaints *re* Section 25 (3) of the Pension Act (Part Three).
Complaints *re* Returned Soldiers' Insurance Act (Part Four).
Complaints *re* General Attitude and Policy of Administration (Part Five).

It is now proposed to state the circumstances under which the telegram forming the subject of this investigation was published and to sum up briefly, and subject to the foregoing references, the various matters referred to in the telegram.

For some years it had been the practice of the House of Commons to appoint each Session a Special Parliamentary Committee to deal with matters of Pensions and Re-establishment. Mr. C. G. MacNeil, Secretary of the Dominion Command of the G.W.V.A., had been accorded the privilege of attending the sittings of these Committees and of giving evidence, submitting suggestions, and in some cases asking questions. The subjects discussed had particularly to do with legislation, (either original or by way of amendments) concerning matters affecting ex-service men and their dependents. Pensions legislation was generally proposed by the Pensions Board and it was the practice in connection with all matters affecting Pensions, to have members of the Pensions Board and their representatives before the Committee to give evidence as to existing laws and to explain the effect of proposed further legislation. Mr. MacNeil had been before the Special Parliamentary Committees of 1919 and 1920 and 1921 and had heard the statements made and explanations given respecting the legislation referred to in foregoing parts of this report.

Mr. MacNeil appeared before the 1922 Committee as the official representative and chairman of the Legislative Committee of the Dominion Veterans' Alliance, which included six organizations, viz., Great War Veterans Association of Canada, Army and Navy Veterans of Canada, Tubercular Veterans' Association, Grand Army of United Veterans, Canadian Legion, and Imperial Veterans of Canada.

The G.W.V.A. had carried on for several years the work of assisting ex-service men in presenting and advocating their claims for pension. A clean sweep compaign had been instituted by this Organization in the autumn of 1921 with the object of endeavouring to secure final and favourable adjustment of all deserving cases. Thousands of claims had been dealt with by Mr. MacNeil and he was familiar, from the correspondence in these cases, with the practice of the Pensions Board so far as it was shown in the disposition of these applications.

In the latter half of 1921 and during the early months of 1922, complaints from applicants greatly increased, and Mr. MacNeil became convinced that greater severity was being exercised by the Pensions Board. Cases were presented to the Pensions Board with the object of securing definite rulings in order to ascertain the principles which were being put in force.

It was found that a requirement was being made that a certain class of ex-service men and their dependents must show that the disability or death as to which claim was made was "attributable to service" and not simply "incurred during service." The full circumstances respecting this are set out in Part Two of this report.

Another situation which arose was in connection with the Returned Soldiers' Insurance Act. The practice had been to insure every ex-service man no matter what his state of health, if he applied before September 1st, 1922, and this had been in accordance with Mr. MacNeil's understanding of the Act and the explanation made in the Parliamentary Committee at the time it was passed. In the latter part of 1921 or the first of 1922 Mr. MacNeil found, from complaints which came to him, that new conditions were being imposed by the Pensions Board which administered the Act, requiring medical examination of those who were ill, and if the applicant was found to be seriously ill, not accepting the application but referring it to the Minister with the recommendation that it be refused. The only exception to this was the case of a man whose proposed beneficiaries were actually dependent on him for support and whose illness was due to a war disability. The full circumstances respecting the Insurance situation are contained in Part Four of this report.

It was also found that what was considered to be a new practice had been inaugurated respecting the pension of a man who served in France and who had a disability on enlistment. The practice as understood by the G.W.V.A., and as set out in an annotation on the Act prepared and distributed by the Pensions Board, was that if a man served in France, he was pensionable for any disability he had on discharge, unless it could be shown that he had a disability on enlistment which was then obvious to a layman, was congential, or had been wilfully concealed. The alleged new practice required that, before such a man was pensionable, he must show that his pre-enlistment disability had increased during service, and further if, after being pensioned, his disability was reduced so that it was no greater than on enlistment, his whole pension was cut off.

So far as Mr. MacNeil knew there were no written or definite regulations affecting any of these changes, and his knowledge of them came through his close touch with various individual cases which came to him for adjustment. These indicated to him not simply special rulings in individual cases, but that there was some underlying radical change in policy the extent and exact character of which he was unable to ascertain.

Mr. MacNeil had conferences in March or April, 1922, with the Pensions Board, and some of the Assistant Medical Advisers, trying to get some definite idea of what was taking place in regard to what he considered was a new practice, but he says that the information he got was very uncertain and indefinite and not altogether consistent.

Mr. MacNeil brought these matters to the attention of the 1922 Parliamentary Committee during April and May, 1922. Some time in May, he received through the mail a document purporting to be a Minute of the Pensions Board passed September 29, 1921, which dealt specifically with the question of pre-enlistment disability and laid down definitely and unequivocally the alleged new practice above referred to. This was the first definite evidence he had that this practice had the official sanction of and was in pursuance of a written and considered regulation of the Board. The Minute had been sent to one of the

Units as authority from Headquarters for a ruling made in an individual case that, since the man's disability had been reduced to a percentage as low as that of his disability on enlistment, pension was cut off. Mr. MacNeil knew of the general medical opinion that it was practically impossible to separate the increase on service from the disability itself, and the practice, as he understood it, had been to pension so long as any disability remained.

Mr. MacNeil considered this Minute, which had been made nearly eight months previously but had never been mentioned to him, as confirmatory of his suspicions that changes were being made clandestinely. He brought his fears to the attention of the Chairman of the Special Parliamentary Committee of 1922, Mr. Marler, M.P., who assiduously endeavoured to bring about a better understanding on the situation and arranged conferences between Mr. MacNeil and the representatives of the Pensions Board.

At these conferences, Mr. MacNeil did not disclose that he knew of the existence of the Minute of September 29, 1921, and although the matter which was dealt with in that Minute was one of the principal subjects of discussion, no mention of the Minute was made by the Pensions Board representatives.

On June 12, 1922, Mr. MacNeil sent a copy of the Minute to Mr. Marler, with the following letter:—

June 12, 1922.

HERBERT MARLER, Esq., M.P.,
Chairman, Special Committee on Pensions,
Insurance and Re-establishment,
House of Commons,
Ottawa.

SIR,—I beg to direct your attention to the attached copy of circular recently issued by the Board of Pension Commissioners dealing with the question of pre-enlistment disabilities, etc., and promulgating regulations discussing a change of policy.

I am requested by this Association to most vigorously protest the change of policy indicated. I have already demonstrated before the sub-committee on Pensions the distressing effect of any such policy. We earnestly hope that the Committee will not lend its sanction to anything which will deprive ex-service men of benefit already provided.

I have consulted, by telegraph, with all the Provincial Commands of this Association and there is general unanimity of opinion that the action of the Pension Board will constitute a grave injustice to a large number of those already accepted as pensioners. Beyond a doubt it is a distinct breach of contract and will be so regarded by all units of organized ex-service men.

There may be difficulties in the way of consideration of further re-establishment benefits. Surely, however, there is no justification for a reduction of this nature.

I am, sir,
Yours faithfully,
C. G. MACNEIL.

A copy of both letter and Minute was also sent to all the Members of the Committee. Mr. MacNeil had already brought to the attention of the Committee the effect of what he considered to be a change of policy in this regard, as evidenced by the individual cases which had come to his attention.

On receipt of the above letter, Mr. Marler immediately arranged and attended a conference between Mr. MacNeil and the Chief Medical Adviser and

the Secretary of the Pensions Board, at which the Pensions Board officials maintained that the ruling contained in the circular was only declaratory of what had always been the practice; this, Mr. MacNeil as positively controverted. No understanding was arrived at, and Mr. Marler's good offices were again put forward and a conference between Mr. MacNeil and the Chairman of the Pensions Board was arranged for the evening of June 12.

At this conference, the Chairman of the Pensions Board took the positive stand that the ruling in the Minute was simply a crystallization of the continuous practice of the Pensions Board, and on Mr. MacNeil referring to what had been stated before the Parliamentary Committees as to the intention in this respect, the Chairman intimated very emphatically, Mr. MacNeil says defiantly, that he had no concern whatever with what had taken place before the Parliamentary Committees. Mr. MacNeil then had positive knowledge of at least three actual cases in which the ruling had been directly applied, although he had a verbal statement from the Chief Medical Adviser that the ruling was to all intents and purposes ineffectual because there would practically never be a case in which it could be possible medically to say, so long as a disability remained, that the portion of the disability accruing on service had disappeared.

On June 14, 1922, Mr. MacNeil reported by letter to Mr. Marler the unsatisfactory result of his interview with the Chairman of the Pensions Board. He set out at length his contentions as to what he considered to be a breach of faith on the part of the Pensions Board in, as he alleged, failing to regard the assurances which had been given before the Parliamentary Committees both as to C.E.F. men and their dependents having to prove "attributability to service" instead of simply that the disability or death was "incurred during service", and also as to the matters referred to in the Minute of September 29, 1921. Mr. MacNeil also forwarded a memorandum setting out quotations from records of Parliamentary Committees showing what had been said and represented as to the application and effect of these provisions of the Statute.

A further endeavour was made by Mr. Marler in a conference between the representatives of the Pensions Board and himself but nothing resulted.

Mr. MacNeil reported from time to time to those of whom he was the representative, advising them of the discovery of the Minute of September 29, 1921, and of the efforts he was making. He was apparently convinced that his endeavours of previous sessions to obtain and maintain measures in the interests of the returned men were being rendered nugatory by the undisclosed rulings of the Pensions Board, and in view of the urgency because the Committee was to present its report to the House the next day, Mr. MacNeil believed his only hope of redress lay in immediate and widespread publicity and sent the telegram the subject of the investigation.

The telegram was published on June 15, 1922. Immediately Mr. Marler arranged a further meeting of the Special Parliamentary Committee for the evening of June 16, at which an enquiry was held into the matters referred to in the telegram. Mr. MacNeil was recalled and gave an explanation. Officials and members of the Pensions Board were also called. Subsequently the Committee made the recommendation that the matter be investigated by a Commission.

The mass of information brought out on this necessarily brief but searchingly conducted preliminary enquiry, as well as the exhaustive reports and proceedings of this and previous Parliamentary Committees, has furnished solid ground work for this investigation and report.

It remains to indicate, without detail or qualifying considerations, only the most salient facts and conclusions respecting the various matters mentioned in the telegram. This is subject to reference to the foregoing parts of the report

without which an incomplete and possibly erroneous impression might be created.

Mr. MacNeil explained to the Parliamentary Committee, and to this Commission, that his idea of "plot" and "conspiracy" was "concurrent action" by the Pensions Board and the Assistant Medical Advisers at Headquarters in making rulings, not made public, which adversely affected the rights of ex-service men. The expresions must, however, be taken as they would be understood by the public who read them, and the Commission considers that the words "contemptible", "conspiracy", "deliberate" and "plot" clearly impute dishonesty of purpose and improper motives.

It was admitted in the argument on behalf of the G.W.V.A. that it had no evidence that the Pensions Board plotted or schemed, in the invidious sense, to bring about the conditions complained of, but it was contended that the circumstances then known to Mr. MacNeil justified him in reaching the conclusion he did. The G.W.V.A., in argument, claimed that a "reckless disregard" of rights or a "supreme indifference" had been shown. But even if these elements had been present, while they might have constituted culpable and gross negligence, they would not support the imputation in the telegram which went much further, and would be taken by the public as charging the Pensions Board with deliberate positive action designedly intended to defraud ex-service men and their dependents.

As already stated in the Introduction to this report, the Commission concludes that the G.W.V.A. has failed to sustain the charges of conspiracy, plot and deliberation or other imputation of wrongful intent by the Pensions Board in dealing with the rights of ex-service men.

The claim that ex-service men have been deprived of rights previously granted by Parliament is sustained. Reference is made to Part Two of this Report. Subject to this, and simply to indicate generally, and not exhaustively, what is referred to, it can be said that the rights considered as coming under this category are those of certain men and certain dependents who, under Sec. 11 of the 1919 Pension Act, were to be entitled to pension for disabilities or deaths "incurred during service" even though not "attributable to service." There are also certain features in the general administration and practice of the Pensions Board by which rights of ex-service men have been adversely affected and as to which reference is made to Part Five of this Report.

The claim in the telegram that "established privileges" have been nullified is justified, in the opinion of the Commission, by the circumstances hereinafter indicated. This term refers in brief to definite understandings as to what the provisions of the Statute meant and the way in which they would be applied. These understandings were in the nature of explanations and assurances given before Parliamentary Committees and in Parliament and recognized and acted on by the Pensions Board. Briefly, the legislation referred to is Section 11 of the 1919 Pension Act and the amendments of 1920, the Returned Soldiers' Insurance Act and Section 25 (3) of the Pension Act. Something of the situation respecting each of these follows.

With respect to Sec. 11 of the 1919 Act, the Pensions Board mistakenly assumed an interpretation which the Commission considers was not warranted by the Statute, and which was also not in accordance with the explanation of the Section made in the House of Commons. Following this assumption, it proposed and prompted the amendment of 1920 and represented that the rights of discharged C.E.F. men and their dependents would not be affected thereby; and when it was found that these rights were affected if the Statute were construed strictly, the Pensions Board, exercising final and exclusive jurisdiction on the law and the facts, did not adopt a possible interpretation by which these

rights would be preserved, nor dit it adopt the alternative course of bringing the situation to the attention of those in authority for such remedial measures as might be indicated, but interpreted and applied the law strictly as it considered the terms of the Statute justified, with the result that these rights were terminated. The effect has been that a substantial number of applicants,—particularly dependents,—have already been refused pension, and that similar cases will be refused as they come up in future. Reference is made to Part Two of this Report.

As to the Returned Soldiers' Insurance Act, the effect of the understanding given at the time the Act was passed was that, as insurance would be available only up to September 1st, 1922, qualifications as to state of health would not be required. The literature issued and the subsequent practice of the Pensions Board for a prolonged period was in accordance with this understanding. Notwithstanding this, the Pensions Board, in January, 1922, believing it to be its duty in view of the supposedly unexpected financial loss involved, without previous or any notice and without publicity, inaugurated and urged confirmation of a practice requiring certain qualifications as to state of health which resulted in the rejection of a large number of applicants who would have been eligible under the original understanding. This was subsequently authorized in part by the Minister and later certain regulations made by the Pensions Board further extending this practice were to a large extent incorporated by Parliament in the Statute, but the operaion of a portion of the new regulations was postponed by Parliament for six months and the whole Act was extended for one year. Reference is made to Part Four of this Report.

The action taken by the Pensions Board as to the interpretation of Sec. 25 (3) respecting pre-enlistment disabilities was that, without any previous notice and without publicity, the Pensions Board passed and issued, on September 29, 1921, a Minute containing an interpretation of this Section. The Minute, as a strict legal interpretation, was confirmed by an opinion subsequently given by the Department of Justice in June, 1922. This opinion further stated that in one instance the interpretation of the Pensions Board was more favourable to the applicant than the Statute warranted. This interpretation, however, excluded one class of applicants which had been clearly included in the explanation given by the Chairman of the Parliamentary Committee in the House of Commons at the time the Act was passed in 1919 and which had been as clearly included in the Annotations issued by the Pensions Board itself a short time later. These Annotations of 1919 were the only authoritative interpretation of the Section up to September 29, 1921. In practice a further restriction is imposed on certain applicants who are not shut out under Sec. 25 (3) by this interpretation. This interpretation is also the foundation of another ruling, contained in the same Minute, which further limited the rights of applicants. The effect of this latter ruling had to be cancelled by subsequent instructions. The Minute of September 29th makes it possible to shut out a substantial number of cases on medical findings. Reference is made to Part Three of this Report.

The statements made by the Pensions Board before Parliamentary Committees that the applicant is given the benefit of any reasonable doubt is not borne out in a substantial number of the hundred and odd cases presented before the Commission. Reference is made to Part Five of this Report. Further cases in evidence show that the term "obvious," in the exceptions to Section 25 (3), would in practice be construed by the Pensions Board as excluding a considerably larger class of cases than those indicated in the definition of this word as given by the Pensions Board before the Parliamentary Committees. Reference is made to Part Three of this Report.

Subject to what is said hereafter, the claim that there has been "deliberate concealment of secret regulations respecting Pensions and Insurance in direct violation of the intention of Parliament" is not sustained. The element of deliberation has already been negatived. The word regulations is used in its broad sense as including declarations and rulings respecting principles and practice. In one sense, the regulations respecting the Returned Soldiers' Insurance Act and respecting Section 25 (3) of the Pension Act were secret, but not as implying wrongful concealment. In individual cases rulings were given based on the principles laid down in these regulations, but without reference to the existence of the regulations themselves. The "secrecy" consisted in: (*a*) giving no opportunity for representations to be made on behalf of the classes which would be affected by these regulations before they were decided on; (*b*) the making of these regulations and rulings without ensuring that there was a general and uniform understanding as to their meaning and application so that applicants could have accurate knowledge as to the principles on which cases were being dealt with; (*c*) not giving these regulations the prompt publicity which the Commission considers was essential under the circumstances, particularly in view of the fact that these regulations were refinements of, and limitations on, broad general principles of interpretation and practice to which general publicity had been given. All this tended to surround the administration of the Pension Act with an air of secretiveness and mystery which created misunderstanding and suspicion. As to these regulations being in "direct violation of the intention of Parliament," the Commission cannot find that, as a matter of law, this is so as to Section 25 (3). As to the Returned Soldiers' Insurance Act, the Commission is of the opinion that while there was wide disccretionary power to refuse applications in individual cases as they came up, a general rule of practice prescribing medical examination, as a condition precedent to considering a certain class of future cases, was not in accordance with the intention of Parliament as expressed in the Statute. Reference is made to Parts Three and Four of this Report.

The evidence justifies the claim that the "policy" of the Pensions Board has been "unsympathetic" in the attitude which has been assumed as to the Pensions Board's function in strictly interpreting and applying the law, and in the gradual development of what might be characterized as encroachments on rights and benefits assumed to have been established by broad general declarations of principle and by practice. Reference is made to Parts Two, Three, and Four of this Report. Lack of sympathy is also illustrated in the requirements made of applicants in some of the cases presented, if they can be taken as indicative of the general policy pursued, and there is no evidence that they are exceptional instances of erroneous decisions. By sympathy, the Commission does not mean a sentimentality which may becloud judgment, but the exercise of that judgment which always keeps in mind the spirit as well as the letter of legislation of this nature. This has been further dealt with in Part Five of this Report, to which reference is made, where the attitude which the Commission considers to be required is indicated, and the functions of the Pensions Board, in addition to those of the usual judicial tribunal, are discussed.

The allegation that there was a "deliberate attempt" by the Pensions Board to "disguise facts before the Parliamentary Committee" is not sustained. Evidently, what took place in the Parliamentary Committee is confused with happenings in informal conferences where statements were made to the effect that the Minute of September 29, 1921, did not change the practice. But, in view of the variety of ideas as to what the former practice really was, if any existed, and of the opinion expressed (although, as the Commission consider, erroneously) as to the negligible effect of the Minute, the Commission

considers that the statements at these informal conferences were made in good faith. Reference is made to Part Five of this Report.

The claim that "basic rights" were challenged is only a repetition of claims which have already been dealt with.

The evidence sustains the claim of "increased severity" since the middle of the year 1921, but this does not necessarily involve "undue" severity, and increased caution was to be expected as the period between the end of the war and the application for pension increased. The evidence of increased severity is mainly contained in the action by the Pensions Board in its strict interpretation of the Statute, in its disregard of the understanding under which the legislation was passed, all of which are discussed in Parts Two, Three and Four, and in connection with the matters referred to fully in Part Five of this Report.

While the imputations of bad faith and the extreme language used in the telegram were, in the light of the evidence now available, not justified, the telegram was published after a cumulation of circumstances which might well have produced the conviction that a system of whittling away rights had been clandestinely inaugurated. The Commission believes that the telegram was published in good faith and as a last resort after a prolonged endeavour to have these rights and supposed established privileges maintained or restored.

On the other hand, the heavy responsibilities of the Pensions Board have already been referred to. It is obvious that it had nothing to gain by refusing pensions. It could have courted popularity and lightened its work by taking a less determined and zealous attitude, and following the line of least resistance. That the action taken was bona fide, and in the course of what it considered to be its duty, the Commission is satisfied. A ground for strong criticism, by the Commission, is that the Pensions Board gave undue prominence to the idea that this duty was (as expressed in its factum) that of a Trustee of Public Funds. This function was, after all, secondary to the duty of the Pensions Board as a Trustee of the rights and benefits which Canada intended for ex-service men and their dependents. While in some instances it was difficult to estimate the exact extent of these rights and benefits from the legislation itself, there were cogent indications which, in the opinion of the Commission and for reasons already given, the Pensions Board should not have disregarded.

Finally, to recapitulate the opinion of the Commission as to *remedial measures*:—

1. *As to Section 11 of the Pension Act,* the Commission is of the opinion that provision should be made:—

(*a*) For payment of pensions to dependents of discharged C.E.F. men in cases of death occurring since September 1, 1920, but due to disabilities incurred during service. This class will automatically include dependent cases which have been deprived of pension because of the error in the date of the Declaration of Peace; and it is not to be overlooked that if death was due to a non-continuous war-time disability, and if the recommendation below as to "missing link cases" is accepted, then the dependents in "missing link cases" should be pensionable as well, and provision should be made accordingly.

(*b*) For payment of pension in any genuine "missing link cases" which have been refused (provided they are not barred by Section 13), and that a definite policy be laid down for the future in respect of these cases, based on a time limit (in medical opinion) within which it can be reasonably said that all disabilities connected with the service period must have shown themselves. It would appear that Section 13 of the Act, which limits the time for application for pension, was passed for this purpose.

2. *As to Section 25 (3) of the Pension Act:*

(*a*) In view of the doubt entertained by the Commission as to whether the interpretation contained in the Pensions Board's Minute of September 29, 1921, (requiring pensionability under Section 11 before Section 25 (3) is applicable), was in fact contemplated or intended at the time the Statute was passed, the Commission considers that the effect of this interpretation should be brought to the attention of Parliament for such action as may be deemed advisable.

(*b*) The Commission is further of the opinion that, in view of the circumstances hereinbefore set out as to the application of Section B of the Minute of September 29, 1921, all cases within the provisions of Section 25 (3) in which pension has been discontinued on the ground that aggravation or increase of disability on service has ceased or disappeared, should be reviewed and adjusted on the basis of the ruling contained in the general instruction of June 26, 1922.

3. *As to the Returned Soldiers' Insurance Act.*—The Commission is of the opinion that provision should be made:—

(*a*) To review all applications which would have been affected if the recommendation of the Parliamentary Committee of 1921, as adopted by the House of Commons, had been carried out (such recommendation being to the effect that, in the absence of fraud, the policy should be in force from the time of the approval of the application and receipt of the premium), and that these cases be dealt with on such review as if the regulations mentioned in such recommendation had been framed and operative.

(*b*) To review and issue policies in respect of all applications which have been rejected since the inauguration of the practice referred to in the letter of the Pensions Board to the Minister, of January 16, 1922, and up to July 1, 1922, except in cases of self-inflicted wounds, immoral conduct or where the application is fraudulent;.

(*c*) In respect of applications coming within recommendations (*a*) and (*b*), where the applicant is dead, to pay insurance as if the policy had been issued and delivered in the life-time of the applicant.

All of the above is respectfully submitted.

J. L. RALSTON,
Chairman.

WALTER McKEOWN,
Commissioner,

A. E. DUBUC,
Commissioner,

February, 1923.